United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,673

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES.

No. 12,674

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES.

No. 12,675

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, ET AL., APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Print
Caption to Transcript from U. S. Circuit Court of Appeals	A
Printed Transcript of Record in Cause No. 12673, with index	B
Printed Transcript of Record in Cause No. 12674, with index	C
Printed Transcript of Record in Cause No. 12675, with index	D
Proceedings in U. S. Circuit Court of Appeals	1
Appearance of Counsel for Appellant in Cause No. 12673	1
Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., et al., in Cause No. 12673	1
Appearance of Counsel for Appellee, Lou Nathanson, in Cause No. 12673	2
Appearance of Counsel for Appellant in Cause No. 12674	2
Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., et al., in Cause No. 12674	2
Appearance of Counsel for Appellant in Cause No. 12675	3
Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., et al., in Cause No. 12675	3
Motion of Appellee Nathanson to dismiss appeal, in Cause No. 12673	4
Letters set out in Appendix to Government's Memorandum filed September 13, 1943, in opposition to Motion of Appellee Nathanson to dismiss appeal	6
Letter, Francis Biddle, Attorney General, to Merrill E. Otis, U. S. District Judge, July 21, 1943	6
Letter, Merrill E. Otis, U. S. District Judge, to Francis Biddle, Attorney General, July 29, 1943	8
Letter, J. Francis O'Sullivan to Francis Biddle, Attorney General, July 30, 1943	10
Order of Submission in Causes Nos. 12673, 12,674 and 12675	12
Opinion, U. S. Circuit Court of Appeals in Causes Nos. 12673, 12674 and 12675	13
Judgment, U. S. Circuit Court of Appeals in Causes Nos. 12673, 12674 and 12675	23
Motion of Appellee Nathanson for Stay of Mandate in Causes Nos. 12673, 12674 and 12675	24
Order denying Motion for Stay of Mandate in Causes Nos. 12673, 12674 and 12675	25
Praecipe of Lou Nathanson for record for Supreme Court, U. S., in Causes Nos. 12673, 12674 and 12675	25
Clerk's Certificate to Transcript	26

[fol. A] Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit at the September Term, 1943, of said Court, before the Honorable John B. Sanborn and the Honorable Walter G. Riddick, Circuit Judges, and the Honorable Harry J. Lemley, District Judge.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 31st day of July, A. D. 1943, transcripts of records pursuant to appeals taken from the District Court of the United States for the Western District of Missouri, were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, and wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, a Corporation, et al., were Appellees, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,873
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., AND W. L. MELLOR AND DAHDE W. WINEBRENNER (ALIAS MURRAY BAILEY) AND CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1913.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 12,673

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., AND W. L. MELLOR AND DAHNE W. WILBRENNER (ALIAS MURRAY BAILEY) AND CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

INDEX.

	Original	Print
Caption to Transcript from United States District Court	1	1
Petition	1	1
First Amended Complaint	3	3
Excerpt from Rule adopted June 17, 1942, relating to Motions	7	8
Motion of United States of America to Stay Proceedings	8	8

	Original	Print
Record Entry of Denial of Motion of United States of America to Stay Proceedings; Motions of Defendants to Dismiss taken under Advisement, April 10, 1943	9	10
Opinion and Order of District Court overruling all Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411, April 15, 1943	10	10
Notice of Appeal filed May 10, 1943, and Recital of Mailing of Copies to Parties of Interest	11	12
Notice of Appeal filed May 15, 1943, and Recital of Mailing of Copies to Parties of Interest	12	12
Excerpts from Oral Opinion of the Court in passing upon Motions for Continuance in Criminal Case No. 15629—United States v. Baker-Lockwood Manufacturing Company, Inc., et al	13	13
Designation of Matters to be Contained in Transcript on Appeal and Service	15	14
Designation of Additional Matters to be Contained in Transcript on Appeal and Service	18	17
Clerk's Certificate to Transcript	21	19
Order of United States Circuit Court of Appeals extending time to file Transcript of Record	22	20
Order of United States Circuit Court of Appeals denying Motion to stay proceedings; Consolidating Cases and setting Cases for hearing at September Term, 1943	23	21

[fol. 1] United States of America, Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 13th day of February, 1943, there was filed in the office of the clerk of said court a Petition in the cause wherein United States of America, at the relation of and to the use of Lou Nathanson is Plaintiff and Baker-Lockwood Manufacturing Co. Inc. and W. L. Mellor and Dahme W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian are Defendants.

Said Petition is as follows:

(Petition.)

In the District Court of the United States of America for the Western District of Missouri, Western Division.

United States of America, at the relation of and to the use of Lou Nathanson, Plaintiff,

No. 1407 vs.

Baker-Lockwood Manufacturing Co. Inc. and W. L. Mellor and Dahme W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian, Defendants.

Plaintiff says that Lou Nathanson is and was at all times prior to and at this date a citizen of the state of Illinois and resides in Cook County in said state.

The plaintiff complaining of the above named defendants in a cause of action to recover double the amount of damages together with the costs of suit and other penalties accruing under and pursuant to section 3490 of the Revised Statutes of the United States Code alleges as follows:

That defendant, Baker-Lockwood Manufacturing Co. incorporated, was a corporation of Missouri in the can-

vas manufacturing business at 14th and Clay St. North Kansas City, Missouri and that W. L. Mellor was president and that Dahme W. Winebrenner was general sales manager.

That Ben D. Christian was president of Safway Steel Products Co. of Milwaukee.

That Cornelius G. Loose was successively administrat-[fol. 2] ing officer, senior administrating officer; principal administrating officer Contract Section General Procurement Branch of the Material Center U. S. Army Air Forces, Wright Field, Dayton, Ohio.

That beginning February 1, 1941 up to the present, in the Kansas City in the Western District of Missouri, in Dayton, Wright Field and London Ohio in Dallas, Texas in Milwaukee, Wisc., the aforesaid defendants agreed to and did defraud the United States of money, property rights and of its right to unbiased services of the defendant, Cornelius G. Loose as principal administrating officer, free from corruption and misrepresentation trickery or fraud in more than $7,000,000.00. to be paid for the manufacture of aircraft field maintenance shelters and was awarded at excessive prices to the damage of the United States in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

That Cornelius G. Loose would accept money from defendants and others under the guise of winning in games of chance and that Cornelius G. Loose would take action in the award of contracts contrary to the best interests of the United States and without merit of bids or offers and would agree to submit excessive bids for the construction of shelters and towers and as part of the conspiracy, Cornelius G. Loose would accept these excessive bids and only the said Baker-Lockwood Manufacturing Co. would be allowed to participate in bids for canvas coverings.

That Ben D. Christian would conceal such transactions and acts to prevent disclosure of the evidence and would destroy and alter books, records and documents in furtherance of said conspiracy arranged by the defendant conspirators. That Dahme W. Winebrenner as part of the con-

spiracy would hold himself out as able to influence Cornelius G. Loose and did so.

That W. L. Mellor and the Baker-Lockwood Manufacturing Co. provided Dahme W. Winebrenner alias Murray Bailey with large sums of money to influence Cornelius G. Loose and favor the said company defendant.

Wherefore, the United States of America, at the relation of and to the use of Lou Nathanson, prays judgment against the defendant for $2,000,000.00 Two Million Dollars., together with interest and costs.

Feb. 13, 1943.

[fol. 3] LOU NATHANSON,
1 N. LaSalle St., Chicago.

First Amended Complaint.

In the District Court of the United States for the Western Division of the Western District of Missouri.

United States of America at the relation of and to the use of Lou Nathanson, Plaintiff,

No. 1407 vs. Civil Action.

Baker-Lockwood Manufacturing Company, Inc. a corporation, W. L. Mellor, Dahme W. Winebrenner (alias Murray Bailey), Cornelius G. Loose, Ben D. Christian and Safway Steel Products, Inc., a corporation, Defendants.

Plaintiff files this first amended complaint before a responsive pleading has been served or filed by any defendant herein, and for cause of action states:

1. Plaintiff Lou Nathanson states that at all times herein mentioned he is and was a resident of Cook County, Illinois, and files and prosecutes this civil action in behalf of the United States of America and himself under Sections 5438 and 3490-3493 (31 U.S.C.A. Secs. 231-234) of the Revised Statutes of the United States, and that this court has jurisdiction thereunder and under Section 3491 of said Revised Statutes (31 U.S.C.A. Sec. 232).

2. That defendant Baker-Lockwood Manufacturing Company, Inc. is a corporation duly organized and exist-

ing according to the laws of Missouri, having its chief office and place of business in Clay County, Missouri.

3. That defendant W. L. Mellor as President of Baker-Lockwood Manufacturing Company, Inc., and is a resident of the Western Division of the Western District of Missouri.

4. That defendant Dahne W. Winebrenner (alias Murray Bailey) was Sales Manager of Baker-Lockwood Manufacturing Company, Inc., and is a resident of Galloway, Ohio.

5. That defendant Cornelius G. Loose was Principal [fol. 4] Administrative Officer, General Procurement Branch, Contract Section, Material Center of the Army Air Force, Wright Field, Dayton, Ohio, and is a resident of Dayton, Ohio.

6. That defendant Ben D. Christian is a resident of Milwaukee, Wisconsin, and defendant Safway Steel Products, Inc., is a corporation duly organized and existing according to law, and has its office and chief place of business in Milwaukee, Wisconsin.

7. None of the defendants are in the military or naval forces of the United States of America or in the militia called into or actually employed in the service of the United States.

8. That the defendants named herein, together with other persons and corporations, the true names of which are unknown to plaintiff, prior to February 1st, 1943, agreed, confederated, combined and conspired with each other and with other persons and corporations, whose names are unknown, to cause to be presented for payment to the United States claims upon or against the Government of the United States, knowing such claims to be fraudulent, and pursuant to such conspiracy, did make or cause to be made, and did present or cause to be presented for payment or approval to or by persons or officers in the civil, military or naval service of the United States, claims upon or against the Government of the United States, knowing such claims to be false, fictitious and fraudulent, and pursuant thereto, for the purpose of obtaining or aiding to obtain the payment or approval of such claims,

made, used or caused to be made or used false bills, receipts, vouchers, rolls, accounts, claims, certificates and affidavits, knowing the same to contain fraudulent or fictitious statements and entries.

9. That defendants and each of them entered into an agreement, combination, confederation or conspiracy with each other to defraud the Government of the United States by obtaining or aiding to obtain the payment or allowance of false and fraudulent claims against the United States, with the intent to defraud the United States, and with the intent to wilfully conceal the money or other property so obtained.

10. That the defendants and each of them thereby jointly and severally became liable to forfeit and pay to the United States the sum of Two Thousand ($2,000.00) Dollars for each of the acts and transactions herein men-[fol. 5] tioned, and in addition thereto, are liable for double the amount of the damages sustained by the United States by reason of the doing or committing of said acts.

11. That in pursuance of the agreement, confederation and conspiracy aforesaid, the defendants did procure or cause to be procured certain contracts with the United States War Department numbered Contract W 535 ac 22830 between the United States War Department and Universal Steel Products Company, Contract W 535 ac 28404 between the United States War Department and Baker-Lockwood Manufacturing Company, Inc., Contract W 535 ac 31260 between the United States War Department and Safway Steel Products Company, Inc., and Contract W 535 ac 32112 between the United States War Department and Safway Steel Products Company, Inc. together with other contracts between departments and agencies of the United States Government and other persons or corporations, all of which contracts were obtained, procured, negotiated and executed fraudulently and pursuant to corrupt arrangements made with the Defendant Loose in the abuse by him of his official duties, and at exorbitant and excessive prices.

12. That said contracts and all of them were so procured by intentionally discouraging and precluding competing firms from openly and fairly competing and bid-

ding thereon and by preparing and fraudulently arranging to prepare specifications in such a manner as to favor the parties contracting with the United States and to render bidding by competing firms difficult and by intimidating other bidders; that the acts and conduct of the defendants in the premises were corrupt and illegal and were engaged in by defendants and others, whose names are unknown to plaintiff, for the ultimate purpose of charging the United States of America excessive sums and causing to be presented to the United States of America for payment claims upon or against the Government of the United States, knowing such claims to be fraudulent.

13. That the defendants and each of them knew that the various claims made against the United States pursuant to the confederation and conspiracy between the defendants were in excess of sums for which the contracting parties were legally entitled to collect or obtain, and the United States had been damaged by the payment of false, fraudulent and fictitious claims in a sum the exact [fol. 6] amount of which is unknown, but which, upon information and belief, plaintiff charges was and is in excess of Seven Hundred Fifty Thousand ($750,000.00) Dollars.

14. That by the acts and conduct of the defendants as aforesaid, and pursuant thereto, and to accomplish such purposes, defendant Loose received, agreed to receive and accepted money, presents, rewards, gifts and promises or things of value from the other defendants and some other persons, whose names are unknown, and that same were used to influence the said Loose to favor the other defendants in pursuance of said conspiracy and confederation, and to accept, negotiate and execute contracts with the United States without regard to the merits of offers made by the other defendants or by other interested parties and against the interests of the United States.

15. That the defendants other than the defendant Loose agreed among themselves and others, whose names are unknown, to submit high, arbitrary or excessive bids or offers for the contracts herein mentioned and others, which defendant Loose, pursuant to and in aid of said conspiracy,

accepted or caused to be accepted in behalf of the United States, and the defendants did discourage, deter and prevent others from bidding thereon and prevented and deterred changes in specifications to be made, and all of the defendants confederated together to conceal such transactions and pursuant thereto, destroyed and altered records, books and documents which evidenced the existence of said conspiracy and the acts done pursuant thereto.

16. Wherefore, plaintiff demands judgment against each and every one of the defendants for the sum of Two Thousand ($2,000.00) Dollars for each of the actions and transactions done or committed by them or any other person under and pursuant to said agreement, confederation and conspiracy between the defendants, and in addition thereto, prays judgment for double the amount of damages which the court finds the United States has sustained and suffered by reason of said combination, confederation and conspiracy, and by said false, fraudulent and fictitious claims made or caused to be made by the defendants aforesaid, together with interest thereon at the legal rate and all costs of this action.

J. FRANCIS O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri.

[fol. 7]

J. KENTNER ELLIOTT,
134 S. LaSalle Street,
Chicago, Illinois.

Attorneys for Plaintiff.

Filed in the United States District Court March 15, 1943.

(The foregoing First Amended Complaint was filed before any responsive pleading was filed by any of the defendants named in the original Petition to said original Petition.)

(Excerpt from Rule adopted June 17, 1942, relating to Motions.)

"(b) Submission of Motions.

(1) Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments will be permitted on application and proper showing or when asked by the judge before whom motions are pending.

(2) The moving party shall serve and file with his motion and notice a brief written statement of the reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all photographs or documentary evidence he intends to present in support of the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

(3) Each party opposing the motion shall serve and file within five days from the time when a copy of the motion has been served upon him a brief written statement of the reasons in opposition to the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all documentary evidence or photographs which he intends to submit in opposition to the motion, in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure."

[fol. 8] (Motion of United States of America to Stay Proceedings.)

Comes now the United States of America by its attorney Maurice M. Milligan and moves this court to make and enter an order in this cause staying the proceedings herein until the conclusion of the trial in the case of United States of America vs. Baker-Lockwood Mfg. Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose, and Ben D. Christian, Criminal No. 15,555, now pending before this court, and as grounds therefor states:

That there are now pending before this court three civil causes including this cause, being civil numbers 1407, 1408, and 1411, involving the same party plaintiff, the same parties defendant, the same facts and circumstances, and all sought to be maintained under the "Informers Statute", Title 31 U. S. C. A., Secs. 231-234, inclusive; that but one of said suits can by law be maintained; that it is the intention of the War Frauds Unit of the Department of Justice of the United States to prosecute expeditiously and to a speedy conclusion the above styled and numbered criminal case referred to in the first paragraph hereof; that any proceedings of any of the civil cases numbered 1407, 1408, and 1411 before the trial of the criminal case would lead to and involve the taking of the depositions of the same witnesses who were subpoenaed before the United States grand jury which returned said indictment numbered 15,555 and would lead to and involve the issuance of subpoenas duces tecum to said witnesses calling for the production of records, correspondence, and other documentary evidence upon which the Department of Justice of the United States relies to establish the evidentiary facts necessary to support the charge of the indictment; that besides dissipating the energies of the representatives of the War Frauds Unit who are now engaged in the preparation of the above-numbered indictment 15,555 for trial, it would also enable the defendants by indirection to obtain the possession of evidence which they are not permitted by law directly to obtain; that the taking of depositions in any of the civil cases numbered 1407, 1408, and 1411 might likewise lead to the calling of military officers to be examined by the defendants and for the production of military records by which important military secrets might be unpropitiously disclosed; that all of such proceedings would be contrary to the public policy and the public interest; that the stay [fol. 9] of all proceedings in the said civil cases numbered 1407, 1408, and 1411 cannot in any manner prejudice or injuriously affect the interest of any of the parties thereto and that which of the said civil cases should be sustained to the exclusion of the others can be most properly determined only after entry of judgment by this court in the aforementioned criminal indictment numbered 15,555.

Wherefore Movant respectfully prays the court that all proceedings in said civil cases numbered 1407, 1408, and

1411 be stayed subject to and until further orders of this court.

MAURICE M. MILLIGAN,
United States Attorney for the Western Judicial District of Missouri.

Filed in the United States District Court April 9, 1943.

(The above Motion discloses no service of same upon any of the parties to said action, nor was it accompanied by or was there filed therewith any Notice, Written Statement of reasons in support thereof or Citation of authorities upon which Movant relies.)

(Record Entry of Denial of Motion of United States of America to Stay Proceedings; Motions of Defendants to Dismiss Taken Under Advisement, April 10, 1943.)

Now comes on for hearing the Motion of the United States to stay proceedings; defendant Baker-Lockwood Manufacturing Company's motion to dismiss; defendant W. L. Mellor's motion to dismiss and defendant Baker-Lockwood Manufacturing Company's motion to stay proceedings, heretofore filed herein. The parties hereto appearing by their respective attorneys, and said motions are taken up, argued and submitted. The Court denies motion of the United States to stay proceedings, and the defendants motions herein are taken under advisement.

[fol. 10] (Opinion and Order of District Court Overruling all Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U. S. C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of

April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for re-negotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's statute" which has to do with damages for fraud. The "informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel. vs. Hess (decided January 18, 1942), ... U. S. ..... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first two filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order.

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court April 15, 1943.

[fol. 11] (Notice of Appeal Filed May 10, 1943.)

Notice is given that the United States of America, Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause on the 10th of April, 1943, denying the application of the United States to stay proceedings therein.

UNITED STATES OF AMERICA,
Appellant,
By Maurice M. Milligan,
United States Attorney.

Copies of above notice of appeal mailed to Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns; Henderson, Henderson & Swofford; Attorneys for defendant; J. Francis O'Sullivan, Attorney for plaintiff; and Mr. Haveth E. Mau, on May 10, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court May 10, 1943.

[fol. 12] (Notice of Appeal Filed May 15, 1943.)

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant,
By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Henderson, Henderson and Swofford, attorneys for defendants, this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns, Attorneys for defendant, J. Francis O'Sullivan, attorney for plaintiff, and Mr. Haveth E. Mau, on May 18th, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court May 15, 1943.

[fol. 13] (Excerpts from Oral Opinion of the Court in Passing Upon Motions for Continuance in Criminal Case No. 15,629—United States vs. Baker-Lockwood Manufacturing Company, Inc., et al.)

"When one party to a case prevents the attendance of the adversary party's witnesses, that is a different thing from the mere absence of the witness beyond the seas or his mere inability to attend from some distant point. In this case these witnesses are not here because the United States prevents them from being here, for good reason, of course, for the best of reasons. The United States is not the Department of Justice. I have said that before. The United States is the sovereign and the sovereign is the plaintiff here, and the sovereign has prevented these witnesses from being here. It is not the ordinary case at all. The sovereign could have enabled them to be here by a turn of the hand, but there were good reasons why their presence elsewhere was deemed to be necessary. • • • I do not suppose that the success of the war effort depends upon some lieutenant colonel or officer of lesser rank who is in the United States on the first Monday in November. If he is regularly subpoenaed in sufficient time, the United States ought to produce him here, if his expenses are guaranteed in a proper manner, in the manner provided for by law. • • • If the Attorney General will not cooperate—and I am sure he will, because the present Attorney General I

regard as one of the most outstanding men who has filled that high office, certainly a man of the highest character and fairness—but if for some good and sufficient reason the Attorney General will not cooperate, then the ground for continuance because of the absence of that witness, if his testimony appears to be material, would be a very strong ground. * * * The case is passed and reset as to all defendants for the first Monday in November. Is there any other matter?

"Mr. O'Sullivan: If your Honor please, you had made some announcement with respect to case 1407. You said that its trial would succeed or come after the trial of this criminal case.

"The Court: I said that, provided that the criminal cases were tried when they were set.

"Mr. O'Sullivan: You have now tentatively set that for October 4th.

"The Court: That is when I intend to try it, October 4th. The civil case is set for October 4th. * * * So far as the [fol. 14] civil case is concerned it is to be tried * * * unless continued for cause."

Filed in the United States District Court July 12, 1943.

[fol. 15] (Designation of Matters to be Included in Transcript on Appeal and Service.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above-entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint Filed Herein,

(2) The Plaintiff's First Amended Complaint,

(3) Motion of the United States to Stay Proceedings Filed April 9, 1943,

(4) The Clerk's Minutes of the Proceedings Through April 10, 1943,

(5) Record Order of April 10, 1943, Denying Motion of United States to Stay Proceedings.

UNITED STATES OF AMERICA,
Appellant,

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23 day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon Ira B. Burns, Attorney for Dahne W. Winebrenner, by affiant by personally delivering a copy thereof to Wanda Wheatcroft, secretary to Ira B. Burns, at the latter's office, Tenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

[fol. 16] Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth

E. Mau, attorneys for Cornelius G. Loose on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served on Morrison, Nugent, Berger & Johns, Attorneys for Ben D. Christian, by affiant by personally delivering a copy thereof to Fontaine E. Potter, secretary to E. R. Morrison, at the latter's office, Seventeenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

[fol. 17] Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Filed in the United States District Court, July 23, 1943.

[fol. 18] (Plaintiff's Designation of Additional Portions of the Record, Proceedings, Etc., to be Included in the Transcript on Appeal.)

Plaintiff directs the Clerk of the United States District Court for the Western Division of the Western District of Missouri, to include in the transcript of the record on the appeal attempted to be taken by the United States of America through its District Attorney in the above entitled cause, the following additional records, documents, papers, exhibits and statements required and requested by plaintiff, to-wit:

1. Statement or certificate of the Clerk showing:

(a) The date of the filing of the original complaint and first amended complaint, and that said first amended complaint was filed before any responsive pleading to the original complaint was filed by any defendant.

(b) That the motion of the United States to stay proceedings in the above cause, filed April 9th, 1943, disclosed no service of same or notice thereof upon or to either plaintiff or defendants in said cause, and that no written statement of reasons in support of said motion, or citation of authorities upon which movant relied accompanied same or was filed therewith.

2. That portion of this court's Rule on Motions, promulgated June 17th, 1942, with respect to Submission of Motions."

3. Memorandum Opinion of Judge Otis filed April 15th, 1943, "On the Several Motions to Dismiss and the Several Motions to Stay Proceedings," together with the Clerk's Minutes thereon.

4. That portion of the Opinion of Judge Otis in passing on Motions for Continuance of Criminal Case No. 15629, United States vs. Baker-Lockwood, et al., contained on Pages 14, 15, 16, 17, 20, 21 and 22 thereof, as follows:

"When one party to a case prevents the attendance of the adversary party's witnesses, that is a different thing from the mere absence of the witness beyond the seas or his mere inability to attend from some distant point. In this case these witnesses are not here because the United States prevents them from being here, for good reason, of course, for the best of reasons. The United States is not [fol. 19] the Department of Justice. I have said that before. The United States is the sovereign and the sovereign is the plaintiff here, and the sovereign has prevented these witnesses from being here. It is not the ordinary case at all. The sovereign could have enabled them to be here by a turn of the hand, but there were good reasons why their presence elsewhere was deemed to be necessary. * * * I do not suppose that the success of the war effort depends upon some lieutenant colonel or officer of lesser rank who is in the United States on the first Monday in November. If he is regularly subpoenaed in sufficient time, the United States ought to produce him here, if his expenses are guaranteed in a proper manner, in the manner provided for by law. * * * If the Attorney General will not cooperate—and I am sure he will, because the present Attorney General I regard as one of the most outstanding men who has filled that high office, certainly a man of the highest character and fairness—but if for some good and sufficient reason the Attorney General will not cooperate, then the ground for continuance because of the absence of that witness, if his testimony appears to be material, would be a very strong ground. * * * The case is passed and reset as to all defendants for the first Monday in November. Is there any other matter?

"Mr. O'Sullivan: If your Honor please, you had made some announcement with respect to case 1407. You said that its trial would succeed or come after the trial of this criminal case.

"The Court: I said that, provided that the criminal cases were tried on July 12th.

"Mr. O'Sullivan: You have now tentatively set that for October 4th.

"The Court: That is when I intend to try it, October 4th. The civil case is set for October 4th. * * * So far as the civil case is concerned it is to be tried * * * unless continued for cause.

J. FRANCES O'SULLIVAN,
Attorney for Plaintiff,
700 Gloyd Building,
Kansas City, Missouri.

Receipt of copy of the plaintiff's Designation of Additional Matters to be Included in the Transcript of the Record on Appeal is hereby acknowledged this 26th day of [fol. 20] July, 1943.

HENDERSON, HENDERSON & SWOFFORD,
By Ben W. Swofford,
Attorneys for Defendants, Baker-Lockwood Mfg. Co. Inc. and W. L. Mellor.

RICHARD K. PHELPS,
Asst. United States District Attorney.

Filed in the United States District Court, July 26, 1943.

[fol. 21] (Clerk's Certificate to Transcript.)

United States of America,—Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designations filed herein and made a part hereof, in the cause wherein The United States of America, at the relation of and to the use of Lou Nathanson is Plaintiff and Baker-Lockwood Manufacturing Company, Inc., et al., are Defendants, as fully as the same appears on file and of record in my office.

Seal
U. S. Dist. Court
West. Div.
Western Dist.
of Missouri

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 29th day of July, A. D., 1943.

A. L. ARNOLD,
Clerk, U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed Jul. 31, 1943. E. E. Koch, Clerk.

[fol. 22] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943
Wednesday, July 21, 1943.

United States of America, at the relation and to the use of Lou Nathanson, Plaintiff,

vs.

Baker-Lockwood Manufacturing Co., Inc., W. L. Mellor, Dahne W. Winebrenner (alias Murray Bailey), Cornelius G. Loose, Ben D. Christian, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, and plaintiff Lou Nathanson, being represented by Mr. J. Francis O'Sullivan, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943

[fol. 23] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.
Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al.
Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al,) Baker-Lockwood Manufacturing Company, et al, Appellees.

[fol. 24] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,674
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., W. L. MELLOR, DAHNE W. WINEBRENNER, CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,674

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., W. L. MELLOR, DAHNE W. WINEBRENNER, CORNELIUS G. LOOSE AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

INDEX.

	Original	Print
Caption to Transcript from United States District Court	1	1
Complaint	1	1
Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings	4	4
Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss	5	5

	Original	Print
Affidavit of Maurice M. Milligan	6	6
Record Entry of overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further order of Court, April 15, 1943	7	8
Opinion and Order of District Court overruling all Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411, April 15, 1943	8	8
Notice of Appeal filed May 7, 1943 and Recital of Mailing of Copies to Parties of Interest	9	9
Notice of Appeal filed May 15, 1943 and Recital of Mailing of Copies to Parties of Interest	9	10
Designation of Matters to be Contained in Transcript on Appeal and Service	11	10
Clerk's Certificate to Transcript	13	12
Order of United States Circuit Court of Appeals extending time to file Transcript of Record	14	13
Order of United States Circuit Court of Appeals denying Motion to stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943	15	13

[fol. 1] United States of America,—Sct.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 15th day of February, 1943, there was filed in the office of the Clerk of said court a Complaint in the cause wherein The United States of America is Plaintiff and Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian are Defendants.

Said Complaint is as follows:

(Complaint.)

In the District Court of the United States For the Western District of Missouri, Western Division.

The United States of America, Plaintiff,
No. 1408. vs. Civil Action.
Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Defendants.

(1) This is a civil action brought by the United States of America as plaintiff of which this Court has jurisdiction under Section 24(1) of the Judicial Code, as amended, (28 U. S. C. 41(1)) and is a suit brought under Sections 3490 to 3492, inclusive, and Section 5438 of the Revised Statutes (31 U. S. C. 231-233) of which this Court has jurisdiction under Section 3491 of the Revised Statutes (31 U. S. C. 232).

(2) On information and belief, the defendant, Baker-Lockwood Manufacturing Company, Inc., is a corporation organized under the laws of the State of Missouri, with its principal place of business at North Kansas City, Missouri.

(3) On information and belief, the defendant, W. L. Mellor, at all times herein mentioned, was the president of Baker-Lockwood Manufacturing Company, Inc.

(4) On information and belief, the defendant, Dahne W. Winebrenner, at all times herein mentioned, was the gen-[fol. 2] eral manager of Baker-Lockwood Manufacturing Company, Inc.

(5) On information and belief, the defendant, Cornelius G. Loose, at all times herein mentioned, was Principal Administrative Officer, General Procurement Branch of the Contract Section, Materiel Center, Army Air Force, Wright Field, Dayton, Ohio, whose duties included the negotiations for and awards of contracts for the manufacture of aircraft field maintenance shelters and similar equipment.

(6) On information and belief, the defendant, Ben D. Christian, at all times herein mentioned, was president of Safway Steel Products Company, a corporation with its principal place of business in Milwaukee, Wisconsin.

(7) None of the defendants is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

(8) The defendant, Baker-Lockwood Manufacturing Company, Inc., was engaged in the manufacture of canvas products and through its officers and agents the defendants, W. L. Mellor and Dahne W. Winebrenner, negotiated with the defendant, Cornelius G. Loose, in his official capacity, for the award of contracts for the sale to the United States of aircraft maintenance shelters and similar equipment.

Safway Steel Products Company was engaged in the manufacture of steel products and through its president the defendant, Ben D. Christian, negotiated with the defendant, Cornelius G. Loose, in his official capacity, for the award of contracts for the sale to the United States of aircraft maintenance shelters and similar equipment.

That said corporations, Baker-Lockwood Manufacturing Company, Inc., and Safway Steel Products Company, as a result of the negotiations aforementioned, did obtain the award of various contracts for the sale of aircraft maintenance shelters and similar equipment to the United States Army Air Force.

(9) That in connection with the sale of the aforementioned aircraft maintenance shelters and similar equip-

ment the defendants, in violation of the provisions of Sections 3490 and 5438 of the Revised Statutes (31 U. S. C. 231), and other statutes of the United States of America, as hereinafter more fully appears

[fol. 3] (a) made and caused to be made, and presented and caused to be presented to the United States of America numerous claims knowing that such claims were false, fictitious and fraudulent; and

(b) for the purpose of obtaining and aiding the payment and approval of said claims made, used and caused to be made and used, false bills, receipts, vouchers, accounts, claims and certificates, knowing the same to contain fraudulent and fictitious statements and entries; and

(c) entered into an agreement, combination and conspiracy to defraud the Government of the United States by obtaining and aiding to obtain the payment and allowance of false and fraudulent claims.

(10) The false, fraudulent and fictitious claims hereinabove referred to consisted, among other things, of the following: Prior to the award of the respective contracts obtained by the defendants, Baker-Lockwood Manufacturing Company, Inc., and Safway Steel Products Company, the officers and agents of said corporations who conducted the negotiations therefor, for the purpose of charging and collecting exorbitant and excessive prices for aircraft maintenance shelters, and similar equipment, entered into certain corrupt arrangements with the defendant, Cornelius G. Loose, for the abuse by him of his official capacity, whereby the bids of competing firms were intentionally discouraged and precluded; whereby specifications respecting proposed contracts were so prepared as to favor said corporations and to render bidding by competing firms difficult; and whereby bidders were intimidated into making sub-contracts for canvas with Baker-Lockwood Manufacturing Company, Inc., in order to obtain awards of prime contracts; and various other corrupt and illegal practices were engaged in by the defendants directed to the ultimate purpose of charging the United States of America excessive and exorbitant prices for aircraft maintenance shelters and similar equipment. That as a result of the aforedescribed acts, large sums of money were

paid by the United States representing excessive and exorbitant prices for aircraft maintenance shelters and similar equipment which the claimants thereof were not legally en-
[fol. 4] titled to collect or retain, and the United States has therefore been damaged by the payment of false, fraudulent and fictitious claims in an amount which is presently unknown.

(11) By reason of the premises each and every of the defendants became, and is liable to forfeit and pay to the United States the sum of $2,000 for each of the acts and transactions hereinabove described which may be found by this Court to constitute false, fraudulent and fictitious claims and, in addition, double the amount of the damages which the Court finds the United States has sustained by reason of the doing or committing of such acts.

Wherefore, plaintiff demands judgment against each and every of the defendants for the sum of $2,000 for each of the acts and transactions found by this Court to constitute false, fraudulent and fictitious claims against the United States and, in addition, double the amount of damages which the Court finds the United States has sustained by reason of such false, fraudulent and fictitious claims, together with interest and costs of this action.

M. M. MILLIGAN,
United States Attorney.

(Separate Motion of Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause and respectfully request the court to make and enter an order in this cause staying the proceedings herein, and as grounds therefor allege and state that there is now pending in this court three causes of action, including this suit, involving the same parties plaintiff and the same parties defendant, and the same facts and circumstances, and all of said suits are sought to be maintained under the Informer's Statute, Title 31 U. S. C., Sections 231-234, inclusive, (Sec. 3490 Revised Statutes); that the other two

suits so pending are: "United States of America, at the relation of and to the use of Lou Nathanson, plaintiff vs. Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, (alias Murray Bailey), [fol. 5] Cornelius G. Loose and Ben D. Christian, defendants, No. 1407; and "United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, plaintiff, vs. Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner and Ben D. Christian, defendants, No. 1411."

Wherefore, defendants respectfully request the court to make and enter an order staying proceedings herein.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800, Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court, March 25, 1943.

(Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause, and respectfully request the court to make and enter an order in this cause dismissing plaintiff's cause of action as to these defendants, under Rule 12, Federal Rules of Civil Procedure, and as grounds therefor allege and state;

(1) This court lacks the proper jurisdiction of the subject matter and persons of these defendants sufficient to proceed in this action.

(2) The petition fails to state a claim upon which relief can be granted by this court as against these defendants under the Informer's Statute, Title 31, U. S. C. Section 231, to 234, inclusive, (Sec. 3490 R. S.).

Wherefore these defendants pray that this suit be dismissed.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800 Attys. for defts.
Baker-Lockwood Mfg. Co. & W. L. Mellor.

Filed in the United States District Court, March 25, 1943.

[fol. 6] (Affidavit of Maurice M. Milligan)

State of Missouri,
County of Jackson—ss.:

Maurice M. Milligan, being first duly sworn, upon his oath deposes and says that he is, and at all times referred to herein was, the duly appointed United States Attorney and acting as such in and for the Western District of Missouri; that on February 12, 1943, an indictment was found and returned in the case entitled United States vs. Baker-Lockwood, et al., Criminal No. 15,555, by the Grand Jury then sitting; that on February 13, 1943, affiant received a letter bearing date February 11, 1943, and signed Francis M. Shea, Assistant Attorney General which letter stated that a draft of a complaint had been prepared and which recommended that the complaint be filed by affiant at the same time as the said indictment; that affiant found no such draft of complaint enclosed with said letter; affiant further states upon information and belief that on the same day, to-wit:

February 13, 1943, H. Schwartzberg, an attorney in the Claims Division of the Department of Justice, contacted affiant's office by long distance telephone from Washington, D. C., and inquired whether the said complaint had been received; that upon being informed that the complaint was not found enclosed with the letter as aforesaid, H. Schwartzberg stated that he would send a copy of the complaint by airmail for filing; that on Monday, February 15, 1943, affiant received a letter bearing date February 13, 1943, and signed Francis M. Shea, Assistant Attorney General,

with which was enclosed a copy of a complaint which complaint was filed with the Clerk of the United States District Court for the Western District of Missouri within an hour after the opening of the office of the said Clerk on the morning of February 13, 1943, and that the complaint so filed is the same complaint by which the case of United States vs. Baker-Lockwood, et al., Civil No. 1408, was instituted.

Affiant further states upon information and belief that the United States Department of Justice at Washington, D. C., did fully intend that the aforementioned complaint should be enclosed with said letter dated February 11, [fol. 7] 1943, and only through a clerical oversight or mistake was it not so included, that but for said clerical oversight or mistake the said complaint would have in the usual course been filed with the Clerk of the United States District Court for the Western District of Missouri on the morning of February 13, 1943, and prior in time to the filing of the complaint in the case of U. S. ex rel Lou Nathanson vs. Baker-Lockwood, et al., which was filed on February 13, 1943, after 3:00 o'clock P. M.

Affiant further states upon information and belief that the complaint in the case of U. S. ex rel Lou Nathanson vs. Baker-Lockwood, et al. Civil No. 1407 is not based upon any information obtained by said Lou Nathanson in advance of the return of the indictment in the case of U. S. vs. Baker-Lockwood, et al., Criminal No. 15,555, on February 12, 1943, and that said complaint was not drafted until February 13, 1943 on which date said Lou Nathanson travelled to Kansas City, Missouri, by airplane.

MAURICE M. MILLIGAN.

Subscribed and sworn to before me this 9th day of April, A. D., 1943.

(Seal)

A. L. ARNOLD,
Clerk.
By H. C. Spaulding,
Deputy.

Filed in the United States District Court, April 12, 1943.

(Record Entry of Overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further order of Court, April 15, 1943.)

The Court having heretofore heard arguments of counsel on all of the several motions to dismiss and the motions to stay proceedings in the above causes, and now being well and fully advised in the premises; All motions to dismiss are overruled. It Is So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of this Court. It Is So Ordered.

[fol. 8] (Opinion and Order of District Court overruling all Motions of Defendants to Dismiss and Staying proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U.S.C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for renegotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's Statute" which has to do with damages for fraud. The "Informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel vs. Hess (decided January 18, 1942), ... U. S. .... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of

service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first who filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order.

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court April 15, 1943.

[fol. 9] (Notice of Appeal, May 7, 1943).

Notice is given that the United States of America, Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger, and Johns; Henderson, Henderson & Swofford; Ira B. Burns and Haveth E. Mau, Attorneys for defendants, this 7th day of May, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court May 7, 1943.

(Notice of Appeal, May 15, 1943).

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Morrison, Nugent, Berger and Johns; Henderson, Henderson & Swof-
[fol. 10] ford; Ira B. Burns and Haveth E. Mau, Attorneys for defendants this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court May 15, 1943.

[fol. 11] (Designation of Matters to be Included in the Transcript of the Record on Appeal.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint filed herein,

(2) Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings filed March 25, 1943.

(3) Separate Motion of Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause filed March 25, 1943.

(4) Affidavit of Maurice M. Milligan filed April 12, 1943.

(5) The Clerk's Minutes of the Proceedings through April 15, 1943.

(6) Memorandum Opinion and Order on Motions to Dismiss and Motions to Stay filed April 15, 1943.

UNITED STATES OF AMERICA,
Appellant.

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23rd day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth E. Mau, attorneys for Cornelius G. Loose, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD,
Clerk, Western District of Missouri.

[fol. 12] (Seal) By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD,
Clerk, Western District of Missouri,
(Seal) By E. O'Keefe, D. C.

Filed in the United States District Court July 23, 1943.

[fol. 13] (Clerk's Certificate to Transcript.)

United States of America, Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause wherein The United States of America is Plaintiff and Baker-Lockwood Manufacturing Company, et al, are Defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 29th day of July, A. D. 1943.

Seal
U. S. Dist. Court
West. Div.
West. Dist.
of Mo.

A. L. ARNOLD,
Clerk, U. S. District Court.
By H. C. Spaulding,
Deputy Clerk.

Filed July 31, 1943, E. E. Koch, Clerk.

[fol. 14] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Wednesday, July 21, 1943.

United States of America, Plaintiff,

vs.

Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, there being no representation for other parties but it being stated by Mr. Phelps that there is no opposition to the granting of said motion, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943.

[fol. 15] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,

No. ..... vs.

Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al.
Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al.) Baker-Lockwood Manufacturing Company, et al., Appellees.

[fol. 16] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire, the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,675
CIVIL.

UNITED STATES OF AMERICA, APPELLANT,
vs.
BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, W. L. MELLOR (FIRST NAME UNKNOWN), DAHNE WINEBRENNER, CORNELIUS G. LOOSE, AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1909.

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 12,675

CIVIL.

UNITED STATES OF AMERICA, APPELLANT,

vs.

BAKER-LOCKWOOD MANUFACTURING COMPANY, A CORPORATION, W. L. MELLOR (FIRST NAME UNKNOWN), DAHNE WINEBRENNER, CORNELIUS G. LOOSE, AND BEN D. CHRISTIAN, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED JULY 31, 1943.

INDEX.

	Original	Print
Caption to Transcript from United States District Court	1	1
Petition	1	1
Praecipe for Issuance of Summons	3	4
Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings	3	4

	Original	Print
Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss	4	5
Record Entry of overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further order of Court, April 15, 1943	5	6
Opinion and Order of District Court overruling all Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411, April 15, 1943	6	6
Notice of Appeal filed May 7, 1943 and Recital of Mailing of Copies to Parties of Interest	7	7
Notice of Appeal filed May 15, 1943 and Recital of Mailing of Copies to Parties of Interest	7	8
Designation of Matters to be Contained in Transcript on Appeal and Service	9	8
Clerk's Certificate to Transcript	12	11
Order of United States Circuit Court of Appeals extending time to file Transcript of Record	13	12
Order of United States Circuit Court of Appeals denying Motion to stay proceedings; Consolidating cases and setting cases for hearing at September Term, 1943	14	13

[fol. 1] United States of America, Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 17th day of February, 1943, there was filed in the office of the clerk of said court a Petition in the cause wherein United States of America, ex rel. Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, is Plaintiff and Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner, Cornelius G. Loose and Ben D. Christian are Defendants.

Said Petition is as follows:

(Petition.)

United States District Court, Western District of Missouri, Western Division.

United States of America, ex rel. Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, Keith Theatre Bldg., Cincinnati, Ohio, Plaintiff,

No. 1411 vs.

Baker-Lockwood Manufacturing Company, a corporation, North Kansas City, Missouri,

W. L. Mellor (first name unknown) c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri,

Dahne Winebrenner, c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri,

Cornelius G. Loose, Address unknown, Last known address Washington, D. C.,

Ben D. Christian, c/o Safway Steel Products Co., Milwaukee, Wisconsin, Defendants.

Plaintiff states that he is a resident and citizen of the State of Ohio. That he brings this action on his own

behalf and on behalf of the United States of America. That the defendants are residents and citizens of the States of Missouri and Wisconsin, and of the District of Columbia, and that this is an action for the benefit of the United States of America, and that the amount involved in this action is in excess of $3,000.00 exclusive of interest and costs.

[fol. 2] Plaintiff states that the defendants, Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor, Dahne Winebrenner and Ben D. Christian, conspired with the defendant, Cornelius G. Loose, who was then in the employ of the Procurement Division of the United States of America, at Dayton, Ohio, whereby said defendant, Cornelius G. Loose, would inform various persons and companies who desired to make bids for the purpose of entering into contracts with the United States of America that such bids would be accepted if they agreed to give sub-contracts to the defendant company, Baker-Lockwood Manufacturing Company, for such of the work and material handled by the defendant, Baker-Lockwood Manufacturing Company. That by fraud and collusion the said defendants agreed to increase the amounts charged to the United States of America on their respective contracts, and further agreed to reimburse and pay part of said amount to the defendant, Cornelius G. Loose.

Plaintiff states that in pursuance of said fraudulent and collusive agreement, claims were presented by the defendants, Baker-Lockwood Manufacturing Company, W. L. Mellor, Dahne Winebrenner and Ben D. Christian to the United States of America in an amount of $750,000.00, in excess of the ordinary and reasonable amount for work, material and labor furnished, and that said defendants disbursed said amount of $750,000.00 to the individual defendants herein, the corporate defendant herein, and in part to the defendant, Cornelius G. Loose.

Plaintiff states that said conduct and action of these defendants and each of them was carried out as aforesaid and in pursuance thereof they presented and caused to be presented for approval and payment by an officer in the civil, military or naval service of the United States,

claims upon and against the government of the United States in an amount of $750,000.00, in excess of the true amount due them, said defendants knowing that such claim and claims were false, fictitious and fraudulent. That as a result thereof the United States of America has paid, and caused to be paid to said defendants said fraudulent, false and fictitious claim in the amount of $75,000.00, whereby and as a direct result thereof the United States of America was defrauded of the aforesaid sum of $750,000.00.

Plaintiff states that he brings this action under the provisions of Sections 3490, 3491 and 3493 of the U. S. Code [fol. 3] (31-U.S.C. Secs. 231-234) and that he is entitled to recover from the defendants, and each of them, twice the amount of said false, fraudulent and fictitious claim, to-wit, $1,500,000.00, for the benefit of the United States of America.

Wherefore, plaintiff prays the Court for a judgment against the defendants jointly and severally for the amount of $1,500,000.00, and for any and all other relief that is proper, either in equity or in law.

SOL GOODMAN,
First Nat'l Bk. Bldg.,
Cincinnati, Ohio.

BENJAMIN P. PINK,
Keith Theatre Bldg.,
Cincinnati, Ohio.

Attorneys for Plaintiff.

United States of America,
State of Ohio,
County of Hamilton—ss.:

Benjamin P. Pink, being first duly sworn on oath, deposes and says, that he is the Plaintiff in the above styled cause, and that the facts stated in the foregoing Petition are true as he verily believes.

BENJAMIN P. PINK.

Sworn to before me and subscribed in my presence this 16th day of February, 1943.

R. R. BOWEN,
(Seal) Notary Public, Hamilton County, Ohio.

My Commission expires April 17, 1943.

Praecipe.

To the Clerk:—

Issue summons on the defendants and each of them, returnable according to law. Endorse: "Action for the recovery of $1,500,000.00 and plaintiff's costs, and other relief."

SOL GOODMAN
and
BENJAMIN P. PINK,
Attorneys for Plaintiff.

(Separate Motion of Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause and respectfully request the court to make and enter an order in this cause staying the proceedings herein, and as grounds therefor allege and state that there is now pending in this court three causes of action, including this suit, involving the same parties plaintiff, and the same parties defendant, and the same facts and circumstances, and all of said suits are sought to be maintained under the Informer's Statute, Title 31 U.S.C., Section 231-234, inclusive, (Sec. 3490 Revised Statutes); that the other two suits so pending are: "United States of America, at the relation of and to the use of Lou Nathanson, plaintiff, vs. Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, Dahne W. Winebrenner, (alias Murray Bailey) Cornelius G. Loose and Ben D. Christian, defendants, No. 1407, and "United States of America, plaintiff, vs. Baker-Lockwood Manufacturing Company, Inc., W. L. Mel-

lor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, defendants, No. 1408".

Wherefore, defendants respectfully request the court to make and enter an order staying proceedings herein.

[fol. 4]

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800-Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court March 25, 1943.

(Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause)

Come now defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in the above entitled cause, and respectfully request the court to make and enter an order in this cause dismissing plaintiff's cause of action as to these defendants, under Rule 12, Federal Rules of Civil Procedure, and as grounds therefor allege and state:

(1) This court lacks the proper jurisdiction of the subject matter and persons of these defendants sufficient to proceed in this action.

(2) The petition fails to state a claim upon which relief can be granted by this court as against these defendants under the Informer's Statute, Title 31, U.S.C. Section 231, to 234, inclusive, (Sec. 3490 R. S.).

Wherefore, these defendants pray that this suit be dismissed.

HENDERSON, HENDERSON & SWOFFORD,
By M. J. Henderson,
531 Scarritt Bldg., K. C. Mo.
Vi. 0800, Attys. for defts.
Baker-Lockwood Mfg. Co., Inc.,
and W. L. Mellor.

Filed in the United States District Court March 25, 1943.

[fol. 5] (Record Entry of overruling of Motions to Dismiss; Proceedings in Cases 1408 and 1411 stayed until further Order of Court, April 15, 1943.)

The Court having heretofore heard arguments of counsel on all of the several motions to dismiss and the motions to stay proceedings in the above causes, and now being well and fully advised in the premises; All Motions to dismiss are overruled. It Is So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of this Court. It Is So Ordered.

[fol. 6] (Opinion and Order of District Court Overruling All Motions of Defendants to Dismiss and Staying Proceedings in Cases Nos. 1408 and 1411.)

One memorandum will suffice for the several motions to dismiss and the motions to stay proceedings in two of the three cases. A very short memorandum is sufficient. The theory of the motions to dismiss is that the "informer's statute," on which the cases are bottomed, originally the Act of March 2, 1863, now 31 U. S. C., Secs. 231-234, was repealed, by implication, by the enactment of the Act of April 28, 1942, 56 Statutes 245. But the presumption is against repeal by implication. The provision for re-negotiation of contracts in the Act of April 28, to which reference is made, a provision for obviating excessive legitimate profits, in no way is inconsistent with the "informer's statute" which has to do with damages for fraud. The "informer's statute" was treated as in full force by the Supreme Court on January 18, 1943, long after the passage of the Act of April 28, 1942. See U. S. ex rel. vs. Hess (decided January 18, 1942), ... U. S. ..... It is difficult to believe that the Justices of our highest court, who give effect to recent legislation, and all its implications, before the ink is dry, would have analyzed so painstakingly and given effect so completely to an old law which had been put to sleep eight months before, if it had been put to sleep.

Case 1407 was filed February 13, 1943. Case 1408 was filed February 15, 1943. Case 1411 was filed February 17, 1943. Service on defendants in 1408 was ahead of service in 1407 and 1411. All of counsel agree that two of the suits should be stayed. Some of counsel think 1408 should have precedence, because defendants in that case were served with summons first. Obviously, however, precedence goes to the first who filed. The statute is for informers. The first to inform wins the miserable race. The United States is informed when the case is filed. Who cares when the man informed against is informed?

Order

All motions to dismiss overruled. So Ordered.

Proceedings in cases 1408 and 1411 are stayed until the further order of the Court. So Ordered.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court, April 15, 1943.

[fol. 7] (Notice of Appeal, May 7, 1943.)

Notice is given that the United States of America, one of the plaintiffs herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above entitled cause on the 15th day of April, 1943, staying proceedings herein until further orders of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Benjamin P. Pink, atty. for plaintiff; and Henderson, Henderson & Swofford; Morrison, Nugent, Berger & Johns; Ira B. Burns, attorneys for defendants May 7th, 1943.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court, May 7, 1943.

(Notice of Appeal, May 15, 1943.)

Notice is hereby given that the United States of America, plaintiff herein, appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause, No. 1407, on the 10th day of April, 1943, denying the application of the United States to stay proceedings therein.

Further notice is given that the United States of America, plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit, from the order entered in the above-entitled cause No. 1408, on the 15th day of April, 1943, staying proceedings in said cause until further order of the Court.

UNITED STATES OF AMERICA,
Appellant.

By Maurice M. Milligan,
United States Attorney.

Copy of above notice of appeal mailed to Henderson, Henderson & Swofford, Attorneys for defendants, this 15th day of May, 1943.

L. S. SHAW,
Deputy Clerk.

[fol. 8]

Copy of above notice of appeal mailed to Benjamin P. Pink, attorney for plaintiff, Morrison, Nugent, Berger & Johns; Mr. Ira B. Burns, attorneys for defendants on May 18th, 1943.

L. S. SHAW,
Deputy Clerk.

Filed in the United States District Court, May 15, 1943.

[fol. 9] (Designation of Matters to be Included in the Transcript of the Record on Appeal.)

The Clerk of the United States Court for the Western Judicial District of Missouri, will include in the transcript of the record on appeal in the above entitled cause, the following records, documents, papers and exhibits:

(1) The Plaintiff's Complaint filed herein,

(2) Separate Motion of Defendants, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Stay Proceedings filed March 25, 1943.

(3) Separate Motion of Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor to Dismiss Cause filed March 25, 1943.

(4) The Clerk's Minutes of the Proceedings through April 15, 1943.

(5) Memorandum Opinion and Order on Motions to Dismiss and Motions to Stay filed April 15, 1943.

UNITED STATES OF AMERICA,
Appellant.

By M. M. Milligan,
United States Attorney.

Receipt of a copy of the designation of matters to be included in the transcript of the record on appeal is hereby acknowledged this 23 day of July, 1943.

HENDERSON, HENDERSON & SWOFFORD.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Benjamin P. Pink on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

[fol. 10] Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon J. Francis O'Sullivan, Attorney for Lou Nathanson, personally, by affiant by personally delivering a copy thereof to him at his office, Seventh Floor, Gloyd Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was served upon Morrison, Nugent, Berger & Johns, Attorneys for Ben D. Christian, by affiant by personally delivering a copy thereof to Fontaine E. Potter, secretary to E. R. Morrison, at the latter's office, Seventeenth Floor, Bryant Building, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

(Seal)

A. L. ARNOLD,
Clerk, Western District of Missouri.
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation

of Matters to be Included in the Transcript of the Record on Appeal was served upon Ira B. Burns, Attorney for Dahne W. Winebrenner, by affiant by personally delivering a copy thereof to Wanda Wheatcroft, secretary to Ira B. Burns, at the latter's office, Tenth Floor, Bryant Build-
[fol. 11] ing, Kansas City, Missouri, on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

Affidavit of Service.

Irene H. McEntyre, being first duly sworn, upon her oath deposes and says that a copy of the attached Designation of Matters to be Included in the Transcript of the Record on Appeal was mailed to Francis Canny and Haveth E. Mau, attorneys for Cornelius G. Loose on the 23rd day of July, 1943.

IRENE H. McENTYRE.

Subscribed and sworn to before me this 23rd day of July, 1943.

A. L. ARNOLD, Clerk,
(Seal) Western District of Missouri,
By E. O'Keefe, D. C.

Filed in the United States District Court July 23, 1943.

[fol. 12] (Clerk's Certificate to Transcript.)

United States of America,—Sct.:

I, A. L. Arnold, Clerk of the United States District Court for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause wherein the United States of America, ex rel, Benjamin P. Pink, and Benjamin P. Pink, in his own behalf, is Plain-

tiff and Baker-Lockwood Manufacturing Company, a corporation, et al., are Defendants, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 29th day of July, A. D. 1943.

Seal
U. S. Dist. Court
West Div.
West. Dist.
of Mo.

A. L. ARNOLD, Clerk,
U. S. District Court,
By H. C. Spaulding,
Deputy Clerk.

Filed Jul. 31, 1943. E. E. Koch, Clerk.

[fol. 13] (Order extending time to file Transcript of Record.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Wednesday, July 21, 1943.

United States of America, ex rel., Benjamin P. Pink and Benjamin P. Pink in his own behalf, Keith Theatre Bldg., Cincinnati, Ohio, Plaintiff,

vs.

Baker-Lockwood Manufacturing Company, a Corporation, North Kansas City, Missouri, W. L. Mellor, (first name unknown) c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri, Dahne Winebrenner, c/o Baker-Lockwood Manufacturing Co., North Kansas City, Missouri, Cornelius G. Loose, address unknown, last known address Washington, D. C., Ben D. Christian, c/o Safway Steel Products Co., Milwaukee, Wisconsin, Defendants.

This matter comes before the Court on an application for extension of time for filing record on appeal, the United States being represented by Richard K. Phelps, Assistant United States Attorney, there being no representation for other parties but it being stated by Mr. Phelps that there is no opposition to the granting of said motion, and the Court being advised,

It is Ordered that the motion be granted and that appellant the United States be given until on or before August 2, 1943, to file its record on appeal in this cause.

July 21, 1943.

[fol. 14] (Order denying Motion to Stay Proceedings; Consolidating cases and setting cases for hearing at September Term, 1943.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1943.

Tuesday, July 27, 1943.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Lou Nathanson (Plaintiff in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.) Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Baker-Lockwood Manufacturing Company, Inc., et al. Appellees.

Appeal from the United States District Court for the District of Missouri, Western Division.

United States of America, Appellant,
No. ..... vs.
Benjamin P. Pink, (Plaintiff in United States of America, ex rel Benjamin P. Pink, and Benjamin P. Pink in his own behalf vs. Baker-Lockwood Manufacturing Company, et al.) Baker-Lockwood Manufacturing Company, et al., Appellees.

[fol. 15] Mr. Joseph M. Friedman, Attorney, Department of Justice, and Mr. Richard K. Phelps, Assistant

United States Attorney, for United States of America, appellant.

Mr. J. Francis O'Sullivan, for appellee Lou Nathanson.

On motion of the United States of America to stay further proceedings pending appeal.

The motion of the United States of America to stay all further proceedings in the District Court during the pendency of the appeals taken in each of the three above-entitled cases, appearing on the docket of the District Court as Civil Actions Numbers 1407, 1408 and 1411, is denied.

On the Court's own motion, the appeals in the three cases are consolidated for hearing and are hereby set for hearing before Division No. 1 of the Court at the session at St. Paul, Minnesota, on Wednesday, September 8, 1943. The parties are given leave to file consolidated briefs, if they so desire, the printed record and printed brief of the appellant to be served and filed on or before August 16, 1943, with the regular number of copies, and printed brief of appellees to be served and filed on or before September 2, 1943, with the regular number of copies, and reply brief of appellant to be served and filed on or before September 8, 1943, the reply brief being permitted to be in typewritten form and four copies thereof to be filed.

July 27, 1943.

[fol. 1] And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 12,673.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.

JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

(Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,673.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Inc., a corp. and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

[fol. 2] (Appearance of Mr. J. Francis O'Sullivan as Counsel for Appellee, Lou Nathanson, in Cause No. 12,673.)

The Clerk will enter my appearance as Counsel for the Appellee, Lou Nathanson.

J. FRANCIS O'SULLIVAN,
Attorney for Appellee Lou Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Sept. 8, 1943.

(Appearance of Counsel for Appellant in Cause No. 12,674.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,674. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.
JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

[fol. 3] (Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,674.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Co., Inc., a corp., and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

(Appearance of Counsel for Appellant in Cause No. 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

FRANCIS M. SHEA,
Assistant Attorney General.

JOSEPH M. FRIEDMAN,
Attorney, Dept. of Justice
(Claims)

[fol. 4] (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 11, 1943.

(Appearance of Counsel for Appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, in Cause No. 12,675.)

The Clerk will enter my appearance as Counsel for the Appellees, Baker-Lockwood Mfg. Co., Inc., and W. L. Mellor.

M. J. HENDERSON, JR.
BEN W. SWOFFORD,
HERBERT JACOB,
531 Scarritt Bldg.,
Kansas City, Mo.
Attys. for Baker-Lockwood Mfg. Co., Inc., a corp., and W. L. Mellor.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1943.

(Motion of Appellee Nathanson to dismiss appeal, in Cause No. 12,673.)

In the United States Circuit Court of Appeals, Eighth Circuit.

United States of America, Appellant,
No. 12,673. vs.
Lou Nathanson (Plaintiff in United States of America at the Relation of and to the Use of Lou Nathanson vs. Baker-Lockwood Manufacturing Company, Inc., et al.), Baker-Lockwood Manufacturing Company, Inc., a corporation, et al., Appellees.

[fol. 5] Appellee Nathanson moves to dismiss the appeal of the United States of America (not a party to the cause below) from the order denying its application to stay proceedings pending trial of a related criminal case upon the docket of the court below, because:

I.

The appellate jurisdiction of this court is wholly statutory and it can not legally review decisions of District Courts which are not final, under Section 128 of the Judicial Code (28 U. S. C. Sec. 225), other than proceedings for injunction, receivership and in admiralty, under Section 129 of the Judicial Code (28 U. S. C. Section 227).

II.

The denial of the Government's motion to stay the trial of this cause pending the trial of the related criminal case was not a final order, nor one granting or refusing an injunction. It was a mere administrative interlocutory order determining the order of trials of cases before the court below. (Neither the Government nor the defendants appealed or even attempted to appeal in the Nathanson case from the ruling denying defendants' motions to stay, so that the question of Nathanson's right to the cause of action under the Informers' Statute is in no way involved in this appeal.)

III.

The Government was not a party to the case below and had no right to file or to attempt to file any motion therein,

or to attempt to stay proceedings in the suit between plaintiff and defendants.

IV.

The Government's motion to stay (N.R.8-10) alleged [fol. 6] no grounds for the relief prayed.

V.

The record (N. R. 8-10) discloses an absolute violation of the Rules of Civil Procedure by appellant, in that no party to the case below was served any copy of the motion to stay, and of the Rules of the District Court (promulgated under Rules 83 and 78, Rules of Civil Procedure), requiring the service and filing of a memorandum brief and citation of the authorities relied upon to be filed with said motion.

VI.

The appeal was not taken in good faith, but solely because the Department of Justice seeks delay in the hope of procuring the passage of House Resolution 1203. That legislation was introduced at the request of the Attorney-General and his Department has strenuously and insistently urged its passage. The Bill, as pending on the Senate Calendar, attempts to place in the hands of the Attorney-General the right and election to abolish all such causes of action not in judgment upon the day of its passage. This is patently demonstrated by (1) a photostatic copy of the Bill as originally introduced and as it passed the House; (2) a Photostatic copy of the Attorney-General's letter to the Speaker of the House, requesting and demanding the legislation, which letter is contained in the Committee Report; (3) a photostatic copy of the Bill as amended and now pending on the Senate Calendar; (4) a photostatic copy of the Congressional Record of July 8th, 1943, and particularly pages 7515 to 7521 inclusive, of the proceedings of the Senate on said date; (5) excerpts from the oral opinion of Judge Otis of July 12th, [fol. 7] 1943, (N. R. 13-14), in passing upon the application to continue the criminal case, No. 16,529, United States of America vs. Baker-Lockwood, et al., and determining the matter of the date of the setting of Nathanson's civil action, No. 1407 below, which opinion was transcribed by the reporter and ordered filed in both the criminal case

and the Nathanson case below; (6) a photostatic copy of telegrams sent by counsel for plaintiff below to the Attorney-General and to the Secretary of War, dated July 12th, 1943; (7) a photostatic copy of letter addressed to the Attorney-General by counsel for plaintiff below, dated July 16th, 1943; (8) a photostatic copy of letter from the War Department, dated July 19th, 1943; and (9) a photostatic copy of letter from the Assistant Attorney-General Shea, for the Attorney-General, dated July 20th, 1943; all of which instruments and documents are herewith filed in support of Appellee Nathanson's motion to dismiss appeal.

J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri.
Attorneys for Appellee Nathanson.

Memorandum of Clerk of Circuit Court of Appeals:

The instruments and documents referred to in the foregoing motion to dismiss are omitted at this place, pursuant to praecipe for record for Supreme Court filed by counsel for Appellee Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 26, 1943.

[fol. 8] Memorandum of Clerk of Circuit Court of Appeals:

The three letters set out in the Appendix to the Government's memorandum filed September 13, 1943, in opposition to Motion of Appellee Nathanson to dismiss appeal, called for in praecipe for record for Supreme Court filed by counsel for Appellee Nathanson, are as follows, viz.:

July 21, 1943.

Honorable Merrill E. Otis,
United States District Judge,
Kansas City, Missouri.

My Dear Judge Otis: It was a pleasure to cooperate with you in your request of June 29, 1943, concerning the crim-

inal case of U. S. vs. Baker-Lockwood Manufacturing Co., et al. I regret exceedingly that circumstances beyond my control made it impossible to arrange for the appearance of one of the witnesses. Assistant Attorney General Tom C. Clark has discussed with me your order of July 12, 1943, continuing the case on the defendants' motion and I can understand that the conditions with which you were confronted precluded any other action except to grant some postponement.

A serious problem is created, however, by the circumstance that the civil suit against these defendants relating to the same offense is now set for trial on a date which precedes the trial date of the criminal case. I have recently received two communications from J. Francis O'Sullivan, Esq., attorney for the plaintiff in the civil suit, and I enclose a copy of his letter of July 16, 1943, for your information.

The civil suit, as you are undoubtedly aware, is not under my control. The statute which gives the right of suit to an informer, in the name of the United States, does not provide for governmental control of that litigation.

[fol. 9] Your familiarity with criminal fraud cases is well known to me, and I am sure you can readily appreciate the prejudice that might be caused to a criminal case by a full disclosure of the Government's evidence in a civil case prosecuted by advocates not selected by the Government or charged primarily with the problem of the Government's rights and interest.

The Senate is presently considering House Resolution No. 1203 which provides for the repeal of the statute under which the civil suit was filed. This bill has been passed by the House and has been recommended by the Senate Committee. If it becomes law at an early date, which now seems likely, it would appear that the right to maintain the civil suit would be withdrawn from the plaintiff Nathanson.

The Federal Bureau of Investigation has conducted the investigation of the facts of this case and it has long been the Department's policy that the results of such investigations are confidential and not available even to Congressional Committees. Under the circumstances you can

readily appreciate that I could not turn over the results of this investigation to Mr. O'Sullivan.

I will appreciate it if you will give consideration to all the facts involved and advise me of your opinion as to whether the ends of justice cannot best be served by a postponement of the civil suit and a stay of the taking of the proposed depositions until after the criminal action has been tried.

Sincerely yours,

s/ FRANCIS BIDDLE,
Attorney General.

Enc. #349862

[fol. 10] Merrill E. Otis,
District Judge.

United States District Court, Western District of Missouri,
Kansas City.

July 29, 1943.

Honorable Francis Biddle,
Attorney General of the United States,
Department of Justice, Washington, D. C.

My Dear Mr. Attorney General: A few days' absence from Kansas City on official business has delayed an acknowledgment of and reply to your letter of July 21, 1943, concerning the case of Nathanson vs. Baker-Lockwood Manufacturing Company, et al., and the companion criminal case of United States v. Baker-Lockwood Manufacturing Company, et al. I was further delayed by the necessity of consulting with counsel in those cases before I could reply to your letter. I just have finished a conference with them.

In your letter you express your reasons for believing that the trial of the case of Nathanson vs. Baker-Lockwood an informer suit) should be delayed until after the trial of the case of United States vs. Baker-Lockwood (a criminal case charging the same facts as are charged in the informer suit).

I agree that the criminal case should be tried first. Whether that now can be done in fairness (you are the last man who would think of asking me to do it otherwise)

is a real problem. I read your letter in the conference just held. I said to counsel that I would like very much to comply with your request. I said also, however, that I must be guided in the matter by principles that are applicable generally unless counsel would stipulate that the civil case might be delayed until after the trial of the criminal case. Counsel for Nathanson, Mr. Francis O'Sullivan, was not willing to enter into such an agreement except upon a condition which I shall state hereafter.

Several months ago I announced that the criminal case would be tried in advance of the civil case, provided the [fol. 11] criminal case was tried when it was set, unless any delay in the criminal case was not chargeable to the United States. The case was set twice, once for June 21 and then for July 12. It was continued twice. The United States was clearly responsible for both continuances. The first continuance was necessary because of the fact that the United States brought in a new indictment against the defendants just a few days before June 21. The second continuance was made necessary because the United States (not the Department of Justice) made impossible the attendance of certain of defendants' witnesses who, on the allegations set out in the application for a continuance, were essential witnesses. The United States Attorney did not feel that he could agree that the witnesses, if present, would testify in accordance with the statements set out in the applications for a continuance. Probably the United States Attorney should not have agreed that they would so testify, but I am not certain that his case would have been jeopardized by that agreement. He did not make the agreement because he did not believe the witnesses would testify as it was said they would. At any rate, it was the action of the United States, the plaintiff in the case, which prevented the trial.

Since I repeatedly had announced in open court, in the presence of all of the parties, that the civil case would be tried when reached in due course if the criminal case had been delayed through the fault of the United States, you must agree with me that I must keep faith with the parties and give the plaintiff in the civil case an opportunity at least to prove his case. It does not seem to me that as the time set for trial draws near he will be so anxious to

proceed as he is now. That, however, is not a matter with which it is my duty to concern myself.

I have said that counsel for Nathanson in open court agreed this morning that he would stipulate that the civil case should be tried after the criminal case on a condition which he stated. It is his contention, and your letter to me confirms it, that it is the hope of the government that the pending legislation directed against suits of this character will make it impossible for the plaintiff ever to get a trial. It seems that the pending bill contains a provision for the filing of a motion by the Attorney General to [fol. 12] stay any civil case of the character here involved. Counsel for Nathanson agrees to enter into the stipulation I have referred to if the Attorney General will stipulate that in this particular case he will not file such a motion. I do not apprehend at all that you will agree not to file such a motion, but it does seem to me that counsel's proposal is not entirely unfair. Probably counsel ought not to be expected to enter into a stipulation that he will hang himself on a not too distant date.

I have written more fully than probably is justified, but I have done that out of my great respect for you and my most earnest desire in every proper way to cooperate with you.

Respectfully yours,

s/ MERRILL E. OTIS.

J. Francis O'Sullivan
Attorney at Law
700 Gloyd Building
921 Walnut Street
Kansas City, Missouri.

July 30, 1943.

Re United States ex rel Lou Nathanson vs. Baker-Lockwood Manufacturing Co., et al., Civil Action 1407.

Hon. Francis G. Biddle,
Attorney General of the United States,
Washington, D. C.

Dear Sir: Receipt is acknowledged of yours of July 20th, which reached me on Friday last. Before I had an op-

portunity to answer you, I was advised on Saturday that Mr. Joseph Friedman, one of your *assistants, would arrive* late on Monday and present motion to stay all proceedings to the Circuit Court of Appeals on Tuesday morning at ten o'clock. I was served with copy of his motion, affidavit and memorandum at five-twenty o'clock p. m. on Monday. It was argued at length on Tuesday and denied.

Thereafter, he and your Mr. Morgan conferred with me in the District Attorney's office. They asked if there were any circumstances under which I would request the [fol. 13] continuance of the civil suit until after the trial of the criminal case. I advised them that because of the pending H. R. 1203 on the Senate Calendar, I could not accede to your wishes or those expressed by Messrs. Shea and Friedman, that I request the trial of the civil case be reset after the criminal case, unless, all things considered, you personally would enter into a stipulation in consideration of such a request on my part that you would file no motion in the civil case to dismiss same, such as is contemplated in the pending legislation, and we could be assured that our case would not in any way be affected by any such legislation.

Your Mr. Friedman told me that he would advise you, Messrs. Clark and Shea of the conversations had, and that he would thereafter call or wire me with respect to the proposal.

I was quite shocked when Judge Otis, at a conference on yesterday, disclosed the receipt of your letter of July 21st, 1943, to him and read its contents to us. I thereafter, and in the presence of representatives of your Department, told Judge Otis of my conversation of Tuesday last with Messrs. Friedman and Morgan, and of the answer I made to them with respect to their suggested continuance of the civil case.

I am aware of the contents of Judge Otis' reply to your letter. I concur in his belief that you should not request my client and myself to willingly delay the trial of the civil case until you can arrange its demise at an early date.

Very truly yours,

JFO'S:T s/ J. FRANCIS O'SULLIVAN.

[fol. 14] (Order of Submission in Causes Nos. 12,673, 12,674 and 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1943.

Wednesday, September 8, 1943.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,674. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

Appeal from the District Court of the United States for the Western District of Missouri.

United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, Inc., et al.

These causes having been called for hearing in their regular order, argument was commenced by Mr. Joseph M. Friedman, Chief, War Frauds Civil Unit, Department of Justice, for the appellant, continued by Mr. J. Francis O'Sullivan for appellee Lou Nathanson in Cause No. 12,673 and for appellees generally, and concluded by Mr. Joseph M. Friedman for the appellant.

Thereupon, these causes were submitted on the records [fol. 15] from said District Court, briefs of counsel for the respective parties, and on the motion of appellee Lou Nathanson to dismiss the appeal in Cause No. 12,673 with brief in support and memorandum in opposition.

[fol. 16] (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 12,673.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor and Dahne W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian and Lou Nathanson (Plaintiff, in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Co., Inc., et al.), Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

No. 12,674.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, Inc., W. L. Mellor, Dahne W. Winebrenner, Cornelius G. Loose and Ben D. Christian, Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

No. 12,675.

United States of America, Appellant,

vs.

Baker-Lockwood Manufacturing Company, a Corporation, W. L. Mellor (first name unknown), Dahne Winebrenner, Cornelius G. Loose, and Ben D. Christian, and Benjamin P. Pink (Plaintiff, in United States of America, ex rel. Benjamin P. Pink, et al., vs. Baker-Lockwood Manufacturing Company, a corporation, et al.), Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

[September 29, 1943.]

Mr. Joseph M. Friedman, Chief, War Frauds Civil Unit, Department of Justice (Mr. Francis M. Shea, Assistant Attorney General, and Mr. Samuel D. Slade, Mr. Bonnell Phillips, and Mr. Jess G. Shiffmann, Attorneys for the United States, were with him on the brief) for appellant.

Mr. J. Francis O'Sullivan (Mr. Maurice J. O'Sullivan was with him on the brief) for appellee Lou Nathanson.

Mr. M. J. Henderson, Jr., Mr. Ben W. Swofford, Mr. Herbert Jacob, and Mr. John B. Pew filed brief for appellees, Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor.

Before Sanborn and Riddick, Circuit Judges, and Lemley, District Judge.

Riddick, Circuit Judge, delivered the opinion of the Court.

On February 12, 1943, the United States grand jury at Kansas City, Missouri, in the Western District of Missouri, returned an indictment charging the Baker-Lockwood Manufacturing Company, Inc., and certain individuals with having entered into a conspiracy to defraud the United States in violation of section 37 of the Criminal Code, 18 U.S.C.A. § 88. On Saturday, February 13, 1943, the day following the return of the indictment, one Nathanson, a resident of Chicago, filed a civil action against the parties charged in the indictment for the recovery of penalties and double damages provided by section 5438, 18 U.S.C.A. §§ 80, 82-86, and sections 3490-3493, 31 U.S.C. §§ 231-243, 31 U.S.C.A. §§ 231-234, of the Revised Statutes, hereinafter sometimes referred to as the false claims statute. The style of this action in the district court was United States of America at the relation of and to the use of Lou Nathanson, Plaintiff, v. Baker-Lockwood Manu-

facturing Company, Inc., et al., Defendants. On the following Monday, February 15, 1943, the United States, proceeding under the same statute against the same parties and for the same relief, filed its civil action under the style of United States of America, Plaintiff, v. Baker-Lockwood Manufacturing Company, Inc., et al., Defendants. And on February 17, 1943 one Pink, a resident of Cincinnati, Ohio, instituted the identical cause of action in the federal district court at Kansas City under the style of United States of America on relation of Benjamin P. Pink, Plaintiff, v. Baker-Lockwood Manufacturing Company, et al., Defendants.

We are concerned here only with the civil proceedings mentioned above. Section 5438 of the Revised Statutes makes punishable by fine and imprisonment certain efforts to defraud the Government of the United States. By sections 3490 to 3493 of the Revised Statutes, it is provided that one committing any of the acts prohibited by section 5438 shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of the damages sustained by the United States, together with costs of the suit, to be recovered in one civil action. The statute commands the district attorneys of the United States to be diligent in the discovery of false claims against the United States and in the prosecution of civil actions to recover the forfeitures and damages provided by the statute. The Act further provides that such suits may be brought and carried on "by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent"; and that a private person bringing the authorized suit and prosecuting it to final judgment shall be entitled

to receive one-half of the amount of the forfeiture and of the damages recovered in the action.

The Baker-Lockwood Manufacturing Company, Inc., filed in each civil action a motion to stay proceedings, alleging that each of the actions involved the same parties plaintiff and defendant, and the same facts and circumstances, and that the defendants could be compelled to respond in only one of them. The United States also in each of the civil actions filed a motion to stay proceedings until the trial of the criminal action, alleging that only one cause of action existed for the recovery of the penalties and damages provided in such cases, and that only one of the civil actions could be tried. All of the motions for stays of the civil actions were submitted to the district court at the same time, and argument thereon was participated in by counsel representing all of the parties. It clearly appears from the record that all parties were agreed that the three civil actions involved the identical cause of action against the defendants and that only one of them could be tried; and further that, at the hearing upon the motions, the sole issue as between the parties to the civil actions was which action was entitled to preference over the other in the order of trial, and that this was the issue decided by the court.

At the conclusion of the hearing on the motions, the district court denied the motion of the Government to stay proceedings in the three civil actions until the trial of the criminal action. No reason was given for this decision, but it is inferable from the record that at the time it was rendered the criminal case had been set for trial ahead of the civil actions. Later it developed that the Government was unable to proceed with the trial of the criminal action because of the absence of necessary witnesses, and it became necessary to postpone its trial. In the meantime, however, the district court, having taken the motions for stays in the civil actions under advisement,

entered in each action an identical order, by which it stayed the trial of the Government's civil action and of Pink's case until further order of the court. The Nathanson suit was set for trial, and, as matters now stand, it will be tried in advance of the Government's criminal action, and before the Government's civil action. The district court was of the opinion that as between the three civil actions the one first filed in the court was entitled to take precedence over the others. The Government has appealed from the order of the district court overruling its motion to stay proceedings in the civil cases until the trial of the criminal case, and from the orders of the district court staying proceedings in the Government's civil action. The appeals have been heretofore consolidated for hearing in this court.

Nathanson has moved to dismiss the appeal of the United States in the Nathanson suit on several grounds, only three of which require notice. He contends (1) that the United States is not a party to the Nathanson suit, and, for that reason, is not entitled to appear in it or appeal from an order made in it; (2) that the Government has not in fact perfected an appeal from the order staying the Government's civil action entered in the Nathanson suit; and (3) that the order of the court staying the Government's suit is a mere procedural order from which no appeal lies. All of these contentions must be denied. The United States is not only a party on the record in the Nathanson suit, it is a real party in interest, and, as such, we think it has the right to appear and be heard in the protection of its interests. Nor is the question whether the Government has perfected an appeal from the stay order entered in the Nathanson suit of any practical importance in decision here. We think the appeal was properly taken. But, in any event, the Government has appealed from the stay order entered in its civil action, and that order, being identical with the stay order entered in the Nathanson

suit and in the Fink suit, made at the same hearing upon the same motion in all three suits, it is unimportant, if true, that the Government has not appealed from one or the other of the record entries of the same order. In the circumstances here an appeal from one, in ultimate result, is an appeal from all. A reversal of the stay order entered in the Government's suit with directions to grant it precedence over the informer's suit disposes of Nathanson's claim to precedence.

We think the order staying the prosecution of the Government's civil action and granting precedence to the trial of Nathanson's action is clearly injunctive in nature, and, as such, appealable under section 129 of the Judicial Code, 28 U.S.C.A. § 227. *Ettelson et al.*, v. *Metropolitan Life Insurance Company*, 317 U.S. 108; *Griesa* v. *Mutual Life Insurance Company*, 8 Cir., 165 Fed. 48. The order was more than a mere administrative, interlocutory order determining the order of the trial of cases before the court below. The effect of the stay order was not merely to determine the order of trial of different actions pending in the district court, but to put an end to the actions, including the Government's action, which were stayed. The court was not dealing with three separate and distinct causes of action, but with one cause of action which had become the subject matter involved in three separate suits. In these circumstances, the trial of one of the cases and the staying of the others effectively disposed of the suits which were stayed. The finality of the order and its injunctive character are sufficiently illustrated by Nathanson's contention that as the first plaintiff to file he is entitled to the exclusive possession and control of the cause of action involved in the three suits, and to priority in trial, as well as by the agreement of all of the parties that the trial of one of the suits would put an end to the others.

This brings us to the merits of the controversy before us. It should be pointed out that we are not concerned with the question of the right of precedence in the order of trial as between mere *qui tam* plaintiffs in different suits on the same cause of action under the false claims statute. That question is not before us and is not decided. Nor is there involved in this proceeding any question of the right of the private informer to proceed in a civil action under the false claims statute, where the Government has neither brought the same action nor indicated an intention to bring it. The precise question here is whether a *qui tam* plaintiff is entitled to the exclusive control and prior trial of an action to recover for frauds perpetrated upon the United States, on the sole ground that the *qui tam* plaintiff was the first to file the proceeding in court, and without regard to the ability of the *qui tam* plaintiff adequately to represent the public interest, where it is conceded that the same cause of action is also being concurrently prosecuted with diligence by the United States through its duly constituted officials. In the decision of the question presented, the relative rights of the Government and of the *qui tam* plaintiff to share in the recovery sought against the defendants are of little or no significance. The public interest is paramount, and the question must be resolved by an interpretation of the false claims statute in the light of considerations of the orderly administration of justice and the effective enforcement of the laws of the land.

In the recent case of *United States ex rel. Marcus* v. *Hess, et al.*, 317 U.S. 537, 63 S. Ct. 379, the court sustained the right of a *qui tam* plaintiff proceeding under the false claims statute to maintain a cause of action to recover penalties and damages provided by the statute, where the Government had brought no civil action of its own, although the *qui tam* plaintiff in that case had contributed nothing to the discovery of the fraud, but had based his

civil action upon information obtained from the Government's successful criminal prosecution. The decision of the court was based upon the interpretation of the false claims statute as related to the facts of that case. The question here was not involved in the proceeding and was not decided (63 S. Ct. 386). In the course of its opinion the court said: "Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds. To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits." We think the statement quoted expresses the only possible interpretation of the Act as applied to the circumstances before us in this case. Congress intended by the Act to ensure vigorous prosecution of suits to recover damages for frauds perpetrated against the Government, and to guard against the possibility of laxity or worse on the part of enforcement officers of the Government, it offered large rewards for the prosecution of such suits on behalf of the Government, where its own officers failed to act with the diligence which the discharge of their official duties required of them. So interpreted, few will question the wisdom of the Act, even though changing circumstances may have made the reward offered the private prosecutor inordinately large. But it is quite another thing to ascribe to Congress the intent to authorize the private informer, at great expense to the public treasury, to usurp the duties of Government prosecuting officers or to proceed with the exclusive prosecution of suits for recovery under the Act when the Government itself through its duly designated officials is proceeding with diligence and dispatch to the same end. The threat to the orderly administration of justice resulting from giving the false claims statute such an interpretation is too obvious to require discussion. To

hold that the Government, after the careful and diligent investigation and preparation necessary to the prosecution of an action in the Government's interest and on its behalf, must stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse is to subjugate the public interest in the orderly administration of justice to the private interest of a citizen in the recovery for himself of the reward offered by the statute.

We find nothing in the wording of the Act of Congress involved here to justify a contrary interpretation. Indeed, the Act contains an expressed recognition of the paramount public interest in suits brought by informers in the provision requiring the consent of the judge and the district attorney to an abatement of the action. Likewise, the provision in the Act that the informer should be liable for all costs incurred in the prosecution of an informer's suit indicates the intention of Congress that informer suits were only authorized when the Government itself does not proceed in the same cause of action. Moreover, we think the justifiable inference from the language of the court in *United States ex rel. Marcus* v. *Hess, et al.*, quoted above, and from the decision of the court in the earlier case of *Francis* v. *United States*, 5 Wall. 338, 18 L. Ed. 603, supports the conclusion which we have reached. In the case last mentioned the right of an informer under a similar statute to project himself into a suit already brought by the Government was denied. The question for decision here can not be made to turn upon the fortuitous circumstance that the Government or the *qui tam* plaintiff was the first to file a pleading in the court. Diligence on the part of governmental enforcement officers in the administration of justice and in the enforcement of the laws of the land for the protection of the public interest may not be made to depend, to use the words of the trial court, upon the outcome of "the miserable race" to the

courthouse. Diligence in the enforcement of the false claims statute requires of the Department of Justice the careful and orderly investigation and preparation of the action to be brought, in order that the Government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public. We hold that in the circumstances disclosed by the record before us the United States is entitled to precedence in the trial of the civil action over those actions brought by the informers, Nathanson and Pink.

The Government does press its appeal from the order of the district court declining to stay proceedings in the civil action pending the trial of the criminal prosecution. As noted above, the record does not disclose clearly the basis of the court's action on that motion. In ordinary circumstances, such a motion is addressed to the discretion of the trial court, and this, we assume, was the situation here. It is proper to point out, however, that on the reversal of the stay orders involved in these appeals, the district court will have before it both the criminal and the civil actions brought by the United States, with the right in the Government to try either action in advance of the civil actions brought by the informers. In these circumstances, the Government should be permitted to elect which of the actions, civil or criminal, it shall first proceed with, in the absence of any showing of prejudice to the defendants in the respective actions or of a want of diligence on the part of the Government in the prosecution of the suit with which it elects to proceed.

The order of the district court overruling the motion to stay the civil actions pending the trial of the criminal prosecution is affirmed. The orders of the district court staying the Government's civil action are reversed, and these cases are remanded to the district court with directions to stay proceedings in the Nathanson suit and in the Pink suit, and for further proceedings in accordance with this opinion.

[fol. 27] (Judgment in Causes Nos. 12,673, 12,674 and 12,675.)

United States Circuit Court of Appeals, Eighth Circuit.

September Term, 1943.

Wednesday, September 29, 1943.

United States of America, Appellant,
No. 12,673. vs.
Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor and Dahne W. Winebrenner (alias Murray Bailey) and Cornelius G. Loose and Ben D. Christian and Lou Nathanson (Plaintiff, in United States of America at the relation of and to the use of Lou Nathanson vs. Baker-Lockwood Manufacturing Co., Inc., et al.)

United States of America, Appellant,
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United States of America, Appellant,
No. 12,675. vs.
Baker-Lockwood Manufacturing Company, a corporation, W. L. Mellor (first name unknown), Dahne Winebrenner, Cornelius G. Loose, and Ben D. Christian, and Benjamin P. Pink (Plaintiff, in United States of America, ex rel, Benjamin P. Pink, et al., vs. Baker-Lockwood Manufacturing Company, a corporation, et al.)

[fol. 28] Appeals from the District Court of the United States for the Western District of Missouri.

These causes came on to be heard on the motion of the appellee Lou Nathanson to dismiss the appeal No. 12,673 (No. 1407 in the District Court), and on the transcripts of the records from said District Court, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the said motion of Lou Nathanson to dismiss the appeal in No. 12,673 be, and it is hereby denied.

It is further ordered and adjudged by this Court that the order of said District Court overruling the motion to stay the civil actions pending the trial of the criminal prosecution be, and it is hereby, affirmed.

It is further ordered and adjudged by this Court that the orders of the said District Court staying the Government's civil action be, and they are hereby, reversed.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court with directions to stay proceedings in the Nathanson suit, No. 1407 in the District Court and in the Pink suit, No. 1411 in the District Court, and for further proceedings in accordance with the opinion of this Court this day filed herein.

September 29, 1943.

[fol. 29] (Separate Motion of Appellee Nathanson for Stay of Mandate in Causes Nos. 12,673, 12,674 and 12,675.)

Comes now Appellee Lou Nathanson, by J. Francis O'Sullivan, his attorney, and respectfully prays that an order be herein entered staying the issuance of the mandate herein until and including November 13th, 1943, and thereafter until final disposition of said cause by the Supreme Court of the United States, in the event that on or before said date there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the petition for writ of certiorari, record and brief have therein been filed, as provided by Rule 16 of this Court. In support of this motion Appellee shows to the Court:

1. That on September 29th, 1943, an opinion was filed in the above captioned causes and an order and judgment was entered in this court reversing and remanding said causes to the District Court of the United States for the Western Division of the Western District of Missouri, with directions to stay proceedings in the Nathanson suit and for further proceedings in accordance with said opinion and judgment.

2. That under Rule 16 of this Court, the mandate in said causes will issue at the expiration of fifteen days after the date of the opinion, judgment and order aforesaid.

3. The Appellee Nathanson intends in good faith to file in the Supreme Court of the United States a petition for writ of certiorari to this Court in these causes within the time allowed by law as provided by the statutes of the United States in such cases, and in accordance with the rules of the Supreme Court of the United States. [fol. 30] Wherefore, Appellee Nathanson prays the Court that the issuance of the mandate of this Court in the aforesaid three causes be stayed until and including November 13th, 1943, and thereafter until final disposition of said cause by the Supreme Court of the United States, as provided for and by Rule 16 of this Court.

J. FRANCIS O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri,
Attorney for Appellee Lou Nathanson.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Oct. 14, 1943.

(Order denying Motion for Stay of Issuance of Mandate in Causes Nos. 12,673, 12,674 and 12,675.)

September Term, 1943.

Monday, October 25, 1943.

This matter comes before the Court upon the separate motion of appellee Lou Nathanson for an order staying the issuance of the mandate of this Court pending application for the writ of certiorari from the Supreme Court of the United States, upon such appellee's memorandum in support of the motion, upon the memorandum of the United States in opposition thereto and upon the oral presentation of the motion by Mr. J. Francis O'Sullivan, counsel for appellee Nathanson. The Court being advised,

It is Ordered that said motion for stay be and is hereby denied.

October 25, 1943.

[fol. 31] (Praecipe of Lou Nathanson for record for use in Supreme Court, U. S., in Causes Nos. 12,673, 12,674 and 12,675.)

The record on certiorari in the above captioned cases will include the following:

1. The printed records in Civil Cases 12,673, 12,674 and 12,675 in the Circuit Court of Appeals.

2. Appellee Nathanson's Motion to dismiss appeal, without the nine attached and accompanying exhibits.

3. The three letters set out upon pages 21-26 in the appendix following the Government's memorandum in opposition to motion of Appellee Nathanson to dismiss appeal.

4. The opinion filed September 29th, 1943, with the judgment and order of the Court of Appeals thereon.

5. Appellee Nathanson's motion to stay mandate filed October 13th, 1943, and the order denying same filed October 25th, 1943.

6. Any other minutes of any proceedings of this Court subsequent to the printing of the transcripts of the record in the aforesaid three appeals, together with this praecipe.

J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
Attorneys for Appellee Nathanson
700 Gloyd Building,
Kansas City, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 30, 1943.

[fol. 32] (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcripts of the records from the District Court of the United States for the Western District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for

the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with praecipe of counsel for Appellee Nathanson, in certain causes in said Circuit Court of Appeals wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, No. 12,673, wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, Inc., et al., were Appellees, No. 12,674, and wherein the United States of America was Appellant and Baker-Lockwood Manufacturing Company, a Corporation, et al., were Appellees, No. 12,675, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the 28th day of October, A. D. 1943, a mandate was issued out of said Circuit Court of Appeals in said causes, directed to the Judges of the [fol. 33] District Court of the United States for the Western District of Missouri.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 16th day of December, A. D. 1943.

(Seal)

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

FILE COPY

Office - Supreme Court,
FILED
DEC 27 194
CHARLES ELMORE CRO
CL

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 560.

LOU NATHANSON, AS PLAINTIFF IN No. 12673, UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., PETITIONER,

VS.

UNITED STATES OF AMERICA, APPELLANT IN CASES: No. 12673, UNITED STATES OF AMERICA, APPELLANT, VS. LOU NATHANSON (PLAINTIFF IN UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL.), BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., A CORPORATION, ET AL., APPELLEES; No. 12674, UNITED STATES OF AMERICA, APPELLANT, VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES; AND No. 12675, UNITED STATES OF AMERICA, APPELLANT, VS. BENJAMIN P. PINK (PLAINTIFF IN UNITED STATES OF AMERICA EX REL. BENJAMIN P. PINK AND BENJAMIN P. PINK IN HIS OWN BEHALF VS. BAKER-LOCKWOOD MANUFACTURING COMPANY ET AL., APPELLEES), RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH MEMORANDA IN SUPPORT THEREOF.

J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
700 Gloyd Building,
Kansas City 6, Missouri,
Counsel for Petitioner.

INDEX

Petition for Writ of Certiorari

Summary and Statement of Matters Involved 2
Opinions Below 4
Statutes Involved 5
Statement of Basis of Jurisdiction 5
Questions Presented for Decision 6

Reasons Relied On for Granting of Writ:

(1) To vindicate and maintain the legislative supremacy to determine policies and to limit the activities of executive departments, as but lately adjudicated on January 18th, 1943, in U. S. ex rel. Marcus vs. Hess 8

(2) To vindicate and maintain the dignity and constitutional finality of the decisions of this Court and the constitutional authority of this Court to require observance thereof by executive departments and courts of inferior jurisdiction 8

(3) To vindicate and maintain the constitutional separation of the powers of government as sustained and declared in U. S. ex rel. Marcus vs. Hess, and to quash coram non judice proceedings on appeal purporting to confirm usurpation by the Department of Justice of the power to control qui tam actions, after that power was denied with finality by adjudication of this Court 9

(4) To vindicate and maintain the finality of the authority of this Court to prohibit usurpation by an executive department of powers reserved to legislative authority after definite adjudication denying the existence of such powers 9

(5) To vindicate and maintain the constitutional denial of authority to impair the obligation of contracts lawfully entered into by the United States 9

(6) To vindicate and maintain the faith and credit of the United States and to quash a decision renouncing the contractual obligations of the United States arising from the timely and exact acceptance of a statutory offer made binding upon the United States by enactment of the supreme legislative authority and approved by the highest executive authority, and but lately construed and sustained by this Court 9

(7) To prevent judicial fiat on appeal interpolating into the False Claims Statutes a nonexistent provision to grant governmental control over the institution and prosecution of qui tam actions. This Court within the year had denied the existence of such power and suggested that recourse was to the legislative forum. The decision contravenes the latest expressions of this Court in U. S. ex rel. Marcus vs. Hess 9

(8) To determine that the single cause of action created by the False Claims Statutes was appropriated when petitioner first filed his suit to recover the statutory sanctions for frauds against the United States. The statute as here construed clearly excludes any later suitors from control 15

(9) To decide that the Government, under all the authorities found, was not a party to petitioner's case, and had no right to file the motion to stay that action 15

(10) To decree that neither the defendants nor the Government filed any notice of appeal from the order entered by the District Court in petitioner's case granting him right of trial of the single statutory cause of action 16

(11) To settle that when the common statutory offer extended alike to all citizens by the False Claims Statutes was accepted by petitioner, by filing his qui tam action prior to any similar ac-

tion, and he incurred liability for and paid costs and actively prepared his case for trial, the Eighth Circuit's decision on appeal unlawfully deprived him of vested quasi-contractual statutory rights and of "due process of law" and equal protection of laws under the Fifth Amendment to the Constitution of the United States 17

Conclusion 25

Appendix 27

TABLE OF CASES

Burrell vs. United States, (C. C. A. 9) 147 Fed. 44, 46 24

Carter vs. Powell, (C. C. A. 5, 1939) 104 F. 2d 428, rehear. den. 104 F. 2d 1012, cert. den. (1940) 60 S. Ct. 173, 308 U. S. 611, 84 L. Ed. 511 16

Chlupsa vs. Posvic, (C. C. A. 7, 1940) 113 F. 2d 375 16

Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196 23

Coombes vs. Getz, 285 U. S. 434, 76 L. Ed. 866 22

Dismuke vs. United States, 297 U. S. 167, 80 L. Ed. 560, l. c. 566 20

Francis vs. United States, 5 Wall. (U. S.) 338, 18 L. Ed. 603 14

Livingston vs. Dorgenois, 3 L. Ed. l. c. 448 15

Lynch vs. United States, 292 U. S. 571, 577, 78 L. Ed. 1434 ..... 21, 24

Shuey vs. United States, 92 U. S. 73, 23 L. Ed. 697 20

Stretton vs. Taylor, 1 Leo. 119, 74 Eng. Rep. 111 (1588/89) 20

Tex-O-Can Flour Mills vs. United States, 49 F. Supp. 516, l. c. 522, 523 24

United States vs. Connor, 138 U. S. 61, 34 L. Ed. 860 ..... 21, 23

United States vs. B. F. Goodrich Co. et al., (D. C. N. Y.) 41 F. Supp. 574, l. c. 575 ..... 15, 23

United States vs. Griswold, 26 Fed. Cases, p. 42, No. 15266, 24 Fed. 361 (1885), affd. 30 Fed. 361 (1887) 17, 23

United States ex rel. vs. Hendrick, 52 F. Supp. 60, 61 (1) Adv. Sh. 12-6-43 15

United States ex rel. Marcus vs. Hess, 317 U. S. 537, 87 L. Ed. 374, 378 ..... 5, 6, 8, 9, 15, 18, 24
United States vs. Powellson, 87 L. Ed. 976 24
United States vs. Thomasson, 4 Biss. 336, Fed. Cases No. 16479 (1889) 23
Wilson vs. United States, 135 F. 2d 1005 19

TEXTBOOKS AND COMMENTARIES

6 Bacon's Abridgment of the Law 134 18
Bacon's Abridgment of the Law, Pardon B 23
1 Bishop's Criminal Law, Secs. 909, 911 18
3 Blackstone 159 18
4 Blackstone 399 ..... 18, 22
3 Coke Institute 238 21
11 Coke 66b 20
Comyn's, A Digest of the Laws of England, Sub. nom. Pardon F 23
Wharton, Criminal Pl., Sec. 528 18
Year Book 1, Henry VII, fol. 3a (Mich. T. Plea 2 (1485)) 19

STATUTES

U. S. C., Title 31, Secs. 231-235, Revised Statutes 3490-3494 ..... 2, 5, 6, 18, 27-28
U. S. C., Title 18, Sec. 80, Revised Statutes, Sec. 5438 ..... 2, 5, 6, 28
U. S. C., Title 28, Sec. 227, Judicial Code, Sec. 129 ..... 7, 12, 17
U. S. C., Title 28, Sec. 347 (a), Judicial Code, Sec. 240 (a) 5
House Resolution 1203: Congressional Record 7/7/43, pp. 7403 et seq., 7/8/43, pp. 7515 et seq., and 9/17/43 7693 et seq. 4

COURT RULES

Federal Rules of Civil Procedure, Rule 15 (a) (c) 2
Federal Rules of Civil Procedure, Rule 73 (b) 16
Supreme Court Rules, Rule 38 5

Supreme Court of the United States

OCTOBER TERM, 194[illegible].

No. .....

LOU NATHANSON, AS PLAINTIFF IN No. 12673, UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., PETITIONER,

VS.

UNITED STATES OF AMERICA, APPELLANT IN CASES: No. 12673, UNITED STATES OF AMERICA, APPELLANT, VS. LOU NATHANSON (PLAINTIFF IN UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL.), BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., A CORPORATION, ET AL., APPELLEES; No. 12674, UNITED STATES OF AMERICA, APPELLANT, VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES; AND No. 12675, UNITED STATES OF AMERICA, APPELLANT, VS. BENJAMIN P. PINK (PLAINTIFF IN UNITED STATES OF AMERICA EX REL. BENJAMIN P. PINK AND BENJAMIN P. PINK IN HIS OWN BEHALF VS. BAKER-LOCKWOOD MANUFACTURING COMPANY ET AL., APPELLEES), RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH MEMORANDA IN SUPPORT THEREOF.

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United

States Circuit Court of Appeals for the Eighth Circuit, entered September 29th, 1943, which reversed and directed the District Court for the Western Division of the Western District of Missouri (a) to stay petitioner's *qui tam* action; and (b) to accord precedence to a similar action on the same facts but filed by the United States two days after petitioner's suit was filed.[1]

SUMMARY AND STATEMENT OF THE MATTERS INVOLVED.

Petitioner's *qui tam* action was filed February 13th, 1943, to recover double damages and penalties from defendants under Secs. 3490-3494 and 5438, Revised Statutes, 31 U. S. C. 231-235, and 18 U. S. C. 80, for false claims against the United States on contracts made with the Army Air Corps (N. R. 1). Two days later, the District Attorney filed a similar action in the same court for the United States, seeking the same recovery (G. R. 1). One Pink later filed a *qui tam* action on the same facts on February 17th, 1943. He did nothing further (P. R. 1-14). That case presents no issue.

Petitioner's complaint was amended and a new defendant added before responsive pleadings were filed, as authorized by Rule 15 (a) (c) F. R. C. P. (N. R. 3-7).

Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, on March 23d, 1943, filed separate motions to dismiss the three pending cases and to stay proceedings in at least two of them (N. R. 10; G. R. 4-5 and 8; P. R. 6). They urged that since there was but one cause of action under the statute, defense of three cases should not be required.

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[1]References to the Transcript of the Record in Case No. 12673 below are cited by the designation N. R.; those in No. 12674 by G. R.; those in No. 12675 by P. R.; and the additional and supplemental Appellate Court record by A. R.

The day before these motions were to be heard, the Government filed motions to stay proceedings in all three cases, until after the trial of a related criminal case (N. R. 8). No notice of the motions was given to any party and no briefs in support were filed, as required by local rule (N. R. 8).

The Government's motions were overruled (N. R. 10). The trial court stated that if trial was had on the date then set, the criminal case would be first tried (N. R. 14).

Defendants' motions to dismiss and to stay in petitioner's case were overruled. Like motions in the United States and Pink cases were sustained. The trial court held that petitioner's prior action appropriated the single cause of action created by the statute (N. R. 10).

The criminal fraud case was thereafter continued twice, first, for a new indictment, and later because the presence of material witnesses was prevented by the Government (N. R. 13). Petitioner's case was definitely set for trial on October 4th, 1943 (N. R. 14), for which petitioner and his counsel diligently prepared.

The Government filed a purported appeal in petitioner's case (to which it was not a party), which was limited to the order of April 10th, 1943, denying the application of the United States to stay proceedings pending the criminal trial (N. R. 12). There was no appeal from the order of April 15th, 1943, denying defendants' motions to stay, and permitting petitioner's case to proceed (N. R. 12).

A preliminary motion to order stay of the trial of petitioner's case pending the Government's appeals, was denied by the Circuit Court of Appeals (N. R. 22).

On filing transcripts of the record in the Circuit Court of Appeals, petitioner moved to dismiss the purported appeal of the United States in his case because (1) there was no statutory or other right to review District Court decisions which were not final, except in proceedings for injunction, etc.; (2) the denial of the Government's mo-

tion to stay was not an injunctive nor a final order; (3) the Government was not a party to petitioner's case and had no right to appeal or to file a motion to stay it, and neither defendants nor the Government appealed from the order denying defendants' motion to stay; (4) because the Government's motion to stay did not allege facts authorizing the relief prayed; (5) that the Rules of Civil Procedure and local rules were disregarded by the United States, in failing to serve a copy of the motion or a memorandum brief; and (6) that the appeal was not in good faith in the usual course of judicial proceeding, but for mere delay while the Department of Justice sought enactment of House Resolution 1203 (A. R. 6[2]; Cong. R. 7/7/43, pp. 7403 *et seq.*, 7/8/43, pp. 7515 *et seq.*, and 9/17/43, pp. 7693 *et seq.*).

There was no direct ruling on petitioner's motion to dismiss the appeal. The District Court order of April 10th, 1943, overruling the Government's motion to stay pending trial of the criminal case, was affirmed. The three cases were remanded with directions (a) to stay all proceedings in petitioner's case and in the Pink action; and (b) to grant the Government precedence in the trial of its civil action filed two days after the single statutory cause of action had been appropriated by the filing of petitioner's case (A. R. 13).

OPINIONS BELOW.

The District Court's opinion (holding petitioner, by filing the first suit under the False Claims Statutes aforesaid, had appropriated the sole cause of action created thereby, to the exclusion of subsequent suitors, including the Government) is printed at N. R. 10. The Circuit Court of Appeals' opinion reversing the District Court (A. R. 13) is reported in 138 F. 2d 48.

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[2]This is demonstrated by the text of the private letter addressed to the trial court by the Attorney General (A. R. 6).

STATUTES INVOLVED.

The statutes involved are Revised Statutes, 3490-3494 and 5438, 31 U. S. C. 231-235, and 18 U. S. C. 80. They appear in the appendix, pp. 27-29.

JURISDICTION.

The decision of the Eighth Circuit Court of Appeals, for which review is sought, was entered September 29th, 1943 (A. R. 23). Motion to stay the mandate pending petition for certiorari filed October 13th, 1943 (A. R. 24) was denied October 25th, 1943 (A. R. 25).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925, and the Act of March 8th, 1934 (28 U. S. C. A., Sec. 347 (a)), and Rule 38 of this Court, in that the Circuit Court of Appeals (1) decided important questions of substance and of public concern which are of special importance in the public interests and contrary to and which nullify the adjudication of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 87 L. Ed. 374, in that (a) the decision granted to the Attorney General the power of control over the institution and prosecution of *qui tam* actions under the False Claims Act which is now fully usurped in this and other Circuits despite the direct ruling of this Court in the Marcus case that he did not possess such power; and (b) it nullified the finality of adjudications of this Court and the authority of the Congress to determine the policies to protect the United States against war frauds, which this Court declared and sustained in the Marcus case, and transferred it to the executive branch; (2) decided important questions of Federal substantive law and procedure which have not been, but should be, settled by this Court, in that, (a) the decision impaired the obligation of the lawful statutory contract offered by the False Claims Act and

accepted by petitioner by filing his prior *qui tam* action and incurring expense and obligation thereby, and (b) thereby denied petitioner due process of law and equal protection of laws contrary to the Fifth Amendment of the Constitution of the United States; and (3) the decision so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision (a) because jurisdiction was exercised on appeal without statutory or other right in reviewing and reversing District Court orders which were not final and not of injunctive nature, and (b) because the decision reversed the order denying a stay of petitioner's action, from which neither defendants nor the Government appealed, and (c) jurisdiction was exercised to reverse petitioner's case on an appeal of the United States, which was not a party to the action, and (d) because due process of law and the right to be heard was denied petitioner by the denial of a trial of his case, which first appropriated the cause of action created by the False Claims Statutes.

QUESTIONS PRESENTED.

1. Where two days before the Government filed a similar action, petitioner had already filed a *qui tam* action for and in the name of the United States to his use, to recover the statutory damages and penalties from defendants as authorized by the False Claims Statute,[3] did the decision of the Eighth Circuit Court of Appeals, on a purported appeal by the United States from a procedural order, err in ruling contrary to the adjudication of this Court in *Marcus* v. *Hess*:[4]

(a) That the False Claims Act granted to the Attorney General of the United States the sole and absolute

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[3]31 U. S. C. 231-235, and 18 U. S. C. 80; R. S. 3490-3494 and 5438.

[4]See 317 U. S. 537, 87 L. Ed. 374, 378.

power to control the institution and prosecution of all *qui tam* actions thereunder after the United States at any time elected to sue in its own behalf, and its officers were thereafter prepared to proceed with diligence?

(b) Where the United States elects to file such suit after an informer has already filed one, must it be granted precedence in the trial of its action and must any prior informer's case filed under the False Claims Statutes be stayed so long as it appears that officers of the United States are prepared to thereafter proceed with diligence?

(c) That an informer filing the first action against defendants under the False Claims Statutes for defrauding the United States either acquired no rights, or alternatively lost them when the United States later elected to file its own action?

(d) That the United States may project itself into a prior *qui tam* action filed by petitioner under the False Claims Statutes by filing a motion to stay proceedings therein, after it filed its own later action against the same defendants and was entitled to appeal from the order denying a stay in the informer's case?[5]

(e) That appeals of the United States filed in its later case and in petitioner's case should be consolidated, and an order made to reverse the informer's case and to set aside an order made therein from which no appeal was taken?

(f) That an order granting or denying a motion to stay proceedings is clearly injunctive in nature and is appealable under Section 129 of the Judicial Code, 28 U. S. C. 227.

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[5]A. R. 7, Honorable Francis Biddle, Attorney-General, in letter addressed to District Judge Otis, dated July 21st, 1943, said:

> "The civil suit, as you are undoubtedly aware, is not under my control. The statute which gives the right of suit to an informer, in the name of the United States, *does not provide for governmental control of that litigation.*"

2. (a) Where the common offer extended to citizens by the False Claims Statutes was accepted by petitioner by filing his *qui tam* action before any similar action was instituted against defendants charged with defrauding the United States, and he paid and incurred liability for costs, took depositions, and actively prepared his case for trial, was petitioner unlawfully deprived of vested quasi-contractual statutory rights and of due process of law and of equal protection of laws under the Fifth Amendment of the Constitution of the United States, by the decision of the Eighth Circuit Court of Appeals, which ruled that the petitioner had no right to proceed with his action because the United States two days later filed a suit in its own behalf, which its officers were then prepared to prosecute with diligence?

(b) Were the obligations of statutory quasi-contractual rights thereby impaired?

3. May a court of inferior jurisdiction authorize the Attorney General of the United States to usurp the powers which he asserted but which were rejected by this Court and decreed to be subject to legislative supremacy in *U. S. ex rel. Marcus* v. *Hess.*

REASONS FOR GRANTING THE WRIT.

It is in the public interests that full jurisdiction of the subject matter should be vested in this Court by issuing the writ in the ordinary, usual and accepted course of judicial proceedings. The decision for which review is prayed imperatively requires the exercise of such jurisdiction, to:

(1) Vindicate and maintain the legislative supremacy to determine policies and to limit the activities of executive departments, as but lately adjudicated on January 18th, 1943, in *U. S. ex rel. Marcus* v. *Hess.*

(2) Vindicate and maintain the dignity and constitutional finality of the decisions of this Court and the

constitutional authority of this Court to require observance thereof by executive departments and courts of inferior jurisdiction.

(3) Vindicate and maintain the constitutional separation of the powers of government as sustained and declared in *U. S. ex rel. Marcus* v. *Hess*, and to quash *coram non judice* proceedings on appeal purporting to confirm usurpation by the Department of Justice of the power to control *qui tam* actions, after that power was denied with finality by adjudication of this Court.

(4) Vindicate and maintain the finality of the authority of this Court to prohibit usurpation by an executive department of powers reserved to legislative authority after definite adjudication denying the existence of such powers.

(5) Vindicate and maintain the constitutional denial of authority to impair the obligation of contracts lawfully entered into by the United States.

(6) Vindicate and maintain the faith and credit of the United States and to quash a decision renouncing the contractual obligations of the United States arising from the timely and exact acceptance of a statutory offer made binding upon the United States by enactment of the supreme legislative authority and approved by the highest executive authority, and but lately construed and sustained by this Court.

(7) Prevent judicial fiat on appeal interpolating into the False Claims Statutes a nonexistent provision to grant governmental control over the institution and prosecution of *qui tam* actions. This Court within the year had denied the existence of such power and suggested that recourse was to the legislative forum. The decision contravenes the latest expressions of this Court in *U. S. ex rel. Marcus* v. *Hess*.[6]

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[6]"Second. Previous to the filing of this action these respondents were indicted for defrauding the government

On January 18th, 1943, this Court, in explicit and unmistakable terms, denied the Attorney General the power of control over the institution or prosecution of *qui tam* actions filed by informers under the False Claims Statutes.

The Justice Department emphatically opposed both the theory and policy of the Act before this Court. It asserted that effective law enforcement required the Attorney General to control the filing and prosecution of such actions.

This Court carefully reviewed the Act, with its legislative history. It reiterated that the Constitution committed to the Congress the supreme and exclusive authority to determine and fix the policies best designed to protect the United States against fraud. In denying the vehement departmental arguments that it was inconceivable under present conditions that the Attorney General did not possess complete control of all litigation affecting the interests of the Government, this Court recognized that while conditions may change, no change was thereby effected in the organic division of governmental powers. It ruled that the statute had not been changed, and said, "But the trouble with these arguments is that they are addressed to the wrong forum."

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and on a plea of *nolo contendere* were fined $54,000. They, and the government which has filed a brief *amicus curiae* at our request, assert that the petitioners received their information not by their own investigation, but from the previous indictment; and both argue that Secs. 3490-3493, 31 U. S. C. A., Secs. 231-234, should not under such circumstances be construed as permitting suit by the petitioners. The petitioners deny that they relied upon the information contained in the indictment, assert that they spent money in conducting an investigation of their own, and claim that they presented more evidence than the government had discovered.

"Even if, as the government suggests, the petitioners have contributed nothing to the discovery of this crime, they have contributed much to accomplishing one of the purposes for which the Act was passed. Their suit results in a net

Every departmental argument advanced was fully discussed and rejected. The identical arguments adopted and announced as controlling law by the Eighth Circuit on appeal were here disapproved after detailed consideration.

There was no departmental acquiescence in the Marcus adjudication of legislative supremacy and exclusive authority within its appointed sphere, nor in recognition of the constitutional finality of decisions of this Court in construing legislative acts and decreeing enforcement thereof by the executive power in conformity therewith.

Confirmation of the powers asserted, but unconditionally rejected in this Court, was sought, but not in the forum suggested. The United States filed a motion to stay proceedings in petitioner's case until after trial of related criminal indictments. Overruling of that motion supplied the vehicle for a purported appeal to the forum selected. There the departmental plea was mistaken for "the voice of the people."

The Eighth Circuit decision on the purported appeal readily granted the power to the Attorney General and his department, that was denied by this Court. The prior obscurity and error concealing the true meaning and legislative intent of the statute was swept away by the decision, after a ready preliminary determination that the

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recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since Sec. 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation.

"Neither the language of the statute nor its history lends support to the contention made by respondents and the government. 'Suits may be brought and carried on by any person,' says the Act, and there are no words of exception or qualification such as we are asked to find. The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer:

United States rightfully interjected itself as a party in petitioner's *qui tam* action, and properly appealed from a procedural order denying a stay until trial of related indictments.

It was found to be clearly manifest that granting or denying such an order was injunctive in nature and unquestionably within the terms of 28 U. S. C. 227, to authorize the appeal. The District Court was reversed and ordered to stay petitioner's action and to grant precedence to the United States in the trial of its action, notwithstanding that it was filed two days after the single right of action for recovery of the statutory sanctions had already been appropriated by the prior filing of petitioner's case.

The False Claims Act, under the Eighth Circuit's enlightened construction, and the Marcus decision under the lens of differentiation, became ductile.

The inherent, self-evident intent of the False Claims Act was adjudged to require dispossession of an informer from the field, after he first opened engagement with defendants, when and if lethargy was once overcome by officers of the United States charged with vigilance in enforcing its rights and their decision was made that thenceforth they were prepared to prosecute its interests with diligence. Thereafter, absolute control with the right of precedence in the trial even of a case subse-

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> " 'The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the persons committing the act.'[10]
>
> "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what

quently filed, must be accorded to them. The question presented was *sui generis*. Obviously, it was not controlled by the Marcus opinion; for there the Attorney General not only filed no action, but opposed Marcus in the prosecution of his case.

If given judicial consideration, no allusion is found to the compelling solemnity of contractual obligations made binding upon the United States after acceptance, by statutory offer of the sovereign people, acting through their lawfully ordained and elected representatives, followed by approval of the highest executive authority and but lately construed and declared valid by the supreme judicial power. The difficulties encountered in overcoming the recognized judicial restraints upon impairing contractual obligations, lawful when entered into under the existing highest judicial construction of a statute, even when changed by a later decision, if found burdensome, were borne in silence.

No solace was extended petitioner for the costs paid and obligations incurred in filing and diligently preparing his case for early trial, nor for the travel and expense required for numerous depositions, nor for his ouster saddled with full liability for costs. Passed without comment also, was the reflection cast by enlightened construction upon the integrity, honor and good faith of the elected representatives of the people. Their true intent was held to be to arouse United States officers out of

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it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[11] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

lethargy into vigilance, at the expense of an informer, but with that purpose once accomplished, the trap of dispossession should drop the informer into a pitfall so as not to impede the feet of those belatedly inspired to move by his prior activity.

The constitutional supremacy of the Congress in the sphere of legislation, so carefully reiterated and sustained here, and the supremacy of this, the only Court created by the Constitution and in which alone is vested the authority to speak with finality, are nullified. The usurped power denied alike by Court and Congress are usurped and now fully exercised by the Justice Department. The Eighth Circuit pronouncement of true statutory meaning has since successfully blended with the executive voice in other jurisdictions, where motions to dismiss *qui tam* actions have been sustained. The decision of which review is sought is currently the accepted and controlling authority, in fact. Constitutional finality of decision has been effectively displaced by executive repudiation benignly sustained, along with an appellate procedure of first impression quite different from all patterns of precedent.

That there is a true and sincere belief that the call of duty justifies the usurpation of power is not ques-

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"Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.[12] To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.

"The very fact that Congress passed this statute shows that it concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here militate against any informer action at all. Had the government filed a suit prior to that instituted by these petitioners, a different question would be presented. Cf. *Francis* v. *United States*, 5 Wall. (U. S.) 338, 18 L. Ed. 603. Under the circumstances here, we could not, without materially detracting from its clear scope, decline to recognize the petitioner's right to sue under the Act."

tioned but is attested by a character without fear and above reproach, which may not be impugned. Sincerity of action, however, is the only flame to which the foundations of government are subject. Zeal has blinded the true intent to sustain and never to destroy. Admonition was ineffective. A direction for exact navigation on the true course will unhesitatingly be followed with undiminished zeal.

(8) Determine that the single cause of action created by the False Claims Statutes was appropriated when petitioner first filed his suit to recover the statutory sanctions for frauds against the United States. The statute as here construed clearly excludes any later suitors from control. Under the recognized principle that two actions for the same cause may not be maintained at the same time, the subsequent cases, including the Government's later case, were properly stayed by the District Court. This rule with respect to *qui tam* suits or "public actions" is as old as the common law.[7]

(9) Decide that the Government, under all the authorities found, was not a party to petitioner's case, and had no right to file the motion to stay that action.[8]

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[7]See *U. S. ex rel. Marcus* v. *Hess*, Headnote 4, and footnotes thereunder.

See *U. S. ex rel.* v. *Hendrick*, 52 F. Supp. 60, 61 (1), Adv. Sh. 12-6-1943.

U. S. v. *B. F. Goodrich Co. et al.*, (D. C., N. Y.) 41 F. Supp. 574, l. c. 575, saying:

"Obviously, under the general rule well known and so long adhered to, one plaintiff should not be permitted to bring and maintain at the same time more than one action for the same relief. The only plaintiff in an action such as this must be the United States, no matter who brings it on its behalf. Before the commencement of this action, suit

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[8]We find in 3 L. Ed. l. c. 448, in connection with the case of *Livingston* v. *Dorgenois*, *supra* (not a *qui tam* action), this significant language:

(10) Decree that neither the defendants nor the Government filed any notice of appeal from the order entered by the District Court in petitioner's case granting him right of trial of the single statutory cause of action. The only purported appeal was from the order refusing the Government's motion to stay pending trial of the related criminal case (N. R. 12). The trial court's action on this motion was affirmed.

Rule 73 (b), Rules of Civil Procedure, provides:

> "*The notice of appeal shall* specify the parties taking the appeal; shall *designate the judgment or part thereof appealed from* (italics ours); and shall name the court to which the appeal is taken."

Where the notice to appeal designated the particular order and judgment from which appeal was taken, other matters not therein specified were not presented for review. *Chlupsa* v. *Posvic*, (C. C. A. 7, 1940) 113 F. 2d 375; *Carter* v. *Powell*, (C. C. A. 5, 1939) 104 F. 2d 428, rehearing den., 104 F. 2d 1012, cert. den. (1940), 60 S. Ct. 173, 308 U. S. 611, 84 L. Ed. 511.

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had already been commenced by the United States in the Mandel case, for the very same relief sought by Scott here. There can be no division of the moneys collected, because among other reasons, the statute expressly provides that such a suit shall be at the sole cost and charge of the person bringing it; and the proceeds are to be divided one-half to him and the other half to the United States. Others are excluded. Even the sovereign has no right to interfere. The first plaintiff has sole control of the action, except that he cannot dismiss it without consent of the judge and the District Attorney. Under the circumstances, this action must be stayed. *United States* v. *Griswold*, 26 Fed. Cas., p. 42, No. 15266; *Bush* v. *United States*, (C. C.) 13 Fed. 625; *United States* v. *Dwight Manufacturing Co.*, (D. C.) 213 Fed. 522; *Beadleston* v. *Sprague*, 6 Johns, (N. Y.) 101; *Ferett* v. *Atwill*, 8 Fed. Cas., p. 1161, No. 4747."

"The government of the United States has no greater right to stay the proceedings in a suit between third persons, than any other individual; and no individual can stay the

The stay order made in the Government's case on defendants' motion was not an appealable order under Section 129, Judicial Code, 28 U. S. C., Sec. 227. The order reads (N. R. 10):

> "Proceedings in Cases 1408 (Government's case) and 1411 (Pink case) are stayed until the further order of the court."

The order was not decisive of the case. It was not of any injunctive nature within Section 129. If the trial court later determined that the Government should proceed with its case instead of petitioner, a mere change of place on the court's docket would accomplish it. The stay order made was a mere procedural stay, from which, in the circumstances, no appeal is provided.

(11) Settle that when the common statutory offer extended alike to all citizens by the False Claims Statutes was accepted by petitioner, by filing his *qui tam* action prior to any similar action, and he incurred liability for and paid costs and actively prepared his case for trial, the Eighth Circuit's decision on appeal unlawfully deprived him of vested quasi-contractual statutory rights and of "due process of law" and equal protection of laws

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U. S. v. *Griswold*, 24 Fed. 361 (1885), affirmed 30 Fed. 361 (1887), saying:

> "By virtue of the statute prescribing the forfeiture and damages recovered in this case, and authorizing any one to sue for them who would, the defendant, Griswold, became bound to pay the same to the prosecutor herein, the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect, and the judgment obtained thereon is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, any more than if it had been obtained in a private

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proceedings in such cases upon the mere suggestion of interest or collusion without becoming a party to the suit. It is true that the United States cannot be brought into court as defendant in all cases; but shall it therefore come when it

under the Fifth Amendment to the Constitution of the United States. The anomalous ruling was that he acquired no rights under the statutes, or was divested thereof when officers of the United States subsequently evidenced interest and activity by filing a similar suit for the United States for the same recovery.

The Act provides that (1) "such suit may be brought and carried on by *any person*, as well for himself as for the United States"; (2) it "shall be at the sole cost and charge of such person"; (3) it may not be dismissed by the United States, although it may be dismissed by the *qui tam* plaintiff with the consent in writing of the judge and District Attorney; and (4) the person bringing suit shall be entitled to one half of the sanctions imposed.

Petitioner's action was authorized by express statute. He undertook the sole burden of costs. In the Marcus case, this Court recognized the informer's interest in the outcome of his action in saying, "The recovery was obtained at the risk of a considerable loss to the petitioner since Section 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation."

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action on the bond of the defendant. 3 Bl. Comm. 159. *For, although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, he could not, by this or any other means known to the law, interfere with its prosecution after it was commenced, or release or dispose of the prosecutor's interest in the judgment therein.* 6 Bac. Abr. 134; 4 Bl. Comm. 399; Whart., Crim. Pl., Sec. 528; 1 Bish., Crim. Law, Secs. 909, 911; *U. S.* v. *Lancaster*, 4 Wash. C. C. 64; *Shoop* v. *Com.*, 3 Pa. St. 126; *U. S.* v. *Harris*, 1 Abb. (U. S.) 110; *Ex parte Garland*, 4 Wall. 381; 2 Hawk. P. C., c. 37, Secs. 34, 54."

It is significant that in the Griswold case the Government was willing to release a $23,576 fraud claim for $100. Cf. *U. S. ex rel. Marcus* v. *Hess*, in which the Government was satisfied

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pleases, and interfere in private concerns? It is sufficient that it can seize what it pleases, and hold what it seizes, without being compellable to account. But it is the only civilized

The statute offered a definite award as an inducement to "*any person*" who successfully protects the United States against and recovered for false claims made. The person first accepting the statutory offer automatically assumed the entire risk of loss. Petitioner's acceptance and active preparation for trial created and continued a mutual covenant with obligations resting on both parties.

In *Wilson* v. *United States*, 135 F. 2d 1005, where the Third Circuit had under consideration an informer's rights under the Tucker Act, it was said:

> "We think that in enacting Section 619 Congress intended the Secretary of the Treasury to make an award and pay compensation to an informer who gave valuable original information to the United States. There is therefore an implied contract within the meaning of the Tucker Act between the United States and the informer who brings himself within the purview of Section 619. As was stated by Mr. Justice Stone in *Dismuke* v. *United States*, 297 U. S. 167, 172, 56 S. Ct. 400, 403, 80 L. Ed. 561, the United States is not bound to provide a remedy in the courts because it has created claims against itself, but '* * *

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with a fine amounting to about one-third of the recovery in the informer's suit.

That the rule contended for by petitioner is as old as the common law is demonstrated by the following authorities:

Year Book 1, Henry VII, fol. 3a (Mich. T. Plea 2 (1485)).

"Once the person who desires to sue (in a popular, or informer's action) has commenced his action, the action is his and it is no longer a popular action, for by bringing suit he has appropriated for himself the (heretofore) strange popular action which before did not belong to him, and neither the King nor any one else can release it as far as his interest is concerned.

"Finally, in all those cases in which a stranger has not yet commenced an action, the King can grant a pardon and re-

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government that refuses to submit its right to judicial decision. * * *

in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer.' In *Tyson* v. *United States*, 32 F. Supp. 135, page 137, 91 Ct. Cl. 139, the Court of Claims reached a conclusion similar to that which we have expressed in respect to the construction of Section 619, stating, 'In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts.' "

In *Dismuke* v. *United States*, 297 U. S. 167, 80 L. Ed. 560, l. c. 566, we find:

"* * * But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. * * *"

While it is established that a reward is revocable at any time before earned or accepted, and anything is done in relying upon the offer (*Shuey* v. *U. S.*, 92 U. S. 73, 23

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lease (the claim) and that will constitute a bar against everybody" (Matters in brackets interpolated by us).

Stretton v. *Taylor*, 1 Leo. 119, 74 Eng. Rep. 111 (1588/89). *Qui tam* action brought by private informer, the Queen's attorney pleaded *non vult prosequi*. HELD, the *nolle prosequi* does not prejudice the private informer. *Same case*: Cro. Eliz. 138. Cf. Cro. Eliz. 583.

11 Coke 66b.

"Note reader, Trin. 31 El. in this Court *inter* Stretton *qui tam*, etc., and Taylor it was adjudged that after a popular action brought, although the King's Attorney will enter

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"It is also objected, that if the cause be sent back, the United States cannot have a hearing. But the United States may intervene, which is a process analogous to a bill of inter-

L. Ed. 697; *U. S.* v. *Connor*, 138 U. S. 61, 34 L. Ed. 860), this Court has consistently ruled that a contract arises when "anything has been done in reliance upon it," or if "something has been done to complete a contract or settle and establish a right under the offer."

In *Lynch* v. *U. S.*, 292 U. S. 571, 577, 78 L. Ed. 1434, it was ruled that "War Risk policies, being contracts, are property and create vested rights." Speaking for a unanimous court, Mr. Justice Brandeis said, at page 579:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of contract with it are protected by the Fifth Amendment."

In the Lynch case, the United States contended that it may be sued only by consent. That issue is not presented here. The Government interjected itself into petitioner's case, and on appeal to the forum selected, a new concept of the true statutory intent was declared, which repudiated the contractual obligations recognized here.

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ulterius non vult prosequi, or the defendant pleads a special plea although the use is, that the Attorney General replies only, yet if he will not reply or prosecute for the King, the informer may prosecute for his part, for by the suit of the informer commenced, he has made the popular action his private action which the King nor any other can release as to his interest."

3 Coke Inst. 238.

"After an action—popular be brought *tam pro domino Rege quam pro se ipso*, according to any statute, the King cannot discharge but his own part and cannot discharge the informer's part, because by the bringing of the action he hath an interest therein: but before action brought the King

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pleader. It is not true that they cannot intervene but as auxiliary to the plaintiff or defendant. This is shown by Pothier,

Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866, held directors to a double liability imposed by a clause in the Constitution of California. It was repealed pending an appeal. This Court ruled that when a contractual obligation arose by virtue of the Constitutional provision and the right to enforce it became vested, it was within the constitutional protection of the contract clause and the Fourteenth Amendment.

On acceptance of the contract voluntarily offered by supreme authority for and in the name of the United States, it became pledged. The Fifth Amendment stands as a bulwark which neither the Eighth Circuit by evolving a changed and strange construction, nor even the Congress, by subsequent legislation to change the former legislative policy of the United States, may lawfully surmount, without violence to the law of the land.

The United States is as firmly bound upon acceptance of its statutory offer to contract as any individual under similar circumstances.

The informer is the primary party to whom the False Claims Statutes, by their language, grant a vested interest, and upon whom it imposes the obligation to pay all costs. It differs therein from other statutes construed by the courts.

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may discharge the whole (unless it be provided to the contrary by the Act) because the informer cannot bring an action or information originally for his part only, but must pursue the statute, and if the action be given to the party grieved the King cannot discharge the same."

4 Blackstone 399.

"Neither, lastly can the King pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty."

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cited by the Attorney-General. He speaks throughout of the right of the third person who intervenes. But if the United States cannot intervene joining one or the other party, why

An informer under the type of an Act of 1861 had no right to object to the dismissal of a suit by the Attorney General, because he had no part whatever in the suit. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196. So, in *U. S.* v. *Thomasson*, 4 Biss. 336, Fed. Cases No. 16479 (1889), an informer under the Internal Revenue Act of 1864 was held not to have a vested interest, and he could not object to which remitted the whole penalty. There again, the informer was not a party to the action. The action and right of recovery were vested solely in the United States.

In *U. S.* v. *Conner, supra*, the Court could find no vested interest granted to an informer by the Internal Revenue Law as amended in 1866, when the informer provision was repealed in 1872. Again, the informer was not a party to the suit and had no claim except such allowance as was fixed by the Secretary of the Treasury after collection of the judgment.

None of these Acts made the informer a party to the suit, nor imposed upon him the obligation for the costs therein. Compare: *U. S.* v. *Griswold*, 24 Fed. 361 (1885), affirmed 30 Fed. 361 (1887); *U. S.* v. *Goodrich Co. et al.*,

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From Bacon's Abridgment of the Law—Pardon B.

"The King can by no charter whatsoever bar any right of Entry of Action or any legal Interest or Benefit theretofore vested in the subject; and therefore it seems clear that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance for the Peace before it is forfeited."

From Comyn's, A Digest of the Laws of England: *Sub. nom.* Pardon F What (offences pardon does) not (discharge).

"Nor, an action commenced *qui tam*, etc., upon a penal statute except for the King's moiety or part."

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not join the defendant who claims under the United States? If his defense is imperfect, why not help him? If collusive, why not make a better?

41 F. Supp. 574, l. c. 575; *U. S. ex rel. Marcus* v. *Hess*, (1943) 317 U. S. 537, 87 L. Ed. 374, 378, construing the False Claims Statutes here involved.

That the vested interest of an informer under the False Claims Act is not within the rule that no vested interest may accrue in governmental gratuities or in a grant of governmental power (such as this Court spoke of in the *Lynch case, supra*) is indicated in that opinion, where Mr. Justice Brandeis said, "Pensions, compensations, allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right."

Likewise, in *U. S.* v. *Powelson*, 87 L. Ed. 976, it was said:

> "The grant of the power of eminent domain is a mere revocable privilege for which a state cannot be required to make compensation."

Here protection was denied to a vested contract right duly created by a statutory offer exactly and timely accepted, whereby the United States and the petitioner became mutually obligated when petitioner, for himself as well as for the United States, filed his action against

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"Even under the Roman civil law, the Emperor himself cannot by rescript affect the property of a person who has not been heard. Code, Tit. 4, C. J. Civ., Vol. 2, p. 258."

In *Burrell* v. *United States*, (C. C. A. 9) 147 Fed. 44, 46, it was held:

> " 'Parties' include all persons who are directly interested in the subject matter in issue, who have a right to make a defense, control the proceedings or appeal from the judgment. Strangers to a suit are persons who do not possess these rights."

See also, for one of the best recent dissertations on the question of "parties" correlating the definitions thereof and citing the cases in connection therewith, Judge Hutcheson's dissenting opinion in case of *Tex-O-Can Flour Mills* v. *United States*, 49 F. Supp. 516, l. c. 522, 523.

defendants. He incurred costs and liability for subsequent expenditures of money required to prepare the case for trial. He was obligated to protect the interests of the United States. He could effect no compromise and could not dismiss without approval and consent of the Court and the Attorney General. The mutual obligations resting on him and upon the United States were reviewed and delineated with authoritative finality in the Marcus case, and make it indisputable that, as in the Lynch case, the vested rights of petitioner are "rights against the United States arising out of contract," for the full performance of the obligations of which the faith and credit of the United States stands as a solemn pledge. The honor of the United States has never been stained by denial of that pledge by either usurped or lawful authority.

Conclusion.

The questions here involved are not merely of interest to the litigants, but of great general importance to all citizens of the United States. Many other *qui tam* actions, such as petitioner's, wherein the Government either filed no suit, or a belated suit, are pending and will be determined by the ruling herein. It is respectfully submitted, therefore, that there is presented a proper occasion for the exercise of the supervisory powers of this Court.

LOU NATHANSON,
Petitioner,
By J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
Counsel for Petitioner.

APPENDIX.

Sections 3490-3493 of the Revised Statutes 12 Stat. 696, 31 U. S. C., Sections 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the sev-

eral Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll,

account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipment, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 598.

LOU NATHANSON, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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Counsel for Petitioner.

INDEX

1. Respondent's cases distinguished 2

2. Public Law No. 213, approved Dec. 23, 1943, violates the Fifth Amendment, because:

(a) petitioner's acceptance of the statutory offer constitutes a contract 3-6

(b) contract obligations created by statute can not be impaired or diminished by a later statute 6-7

3. Conclusion 7

CITATIONS

Cases—

Anderson vs. Brand, 303 U. S. 667, 82 L. Ed. 685, 113 A. L. R. 1482 6

Appleby vs. New York, 271 U. S. 364, 70 L. Ed. 992 6

Clark County vs. Woodbury, (C. C. A. 8) 187 Fed. 412 7

Dartmouth College vs. Woodward, 4 Wheat. 518, 4 L. Ed. 629 6

Douglas vs. Kentucky, 168 U. S. 488, 42 L. Ed. 553 6

Duke Power Co. vs. S. Car. Tax Comm., (C. C. A. 4) 81 F. 2d 513, cert. den. 298 U. S. 669, 80 L. Ed. 1319 6

Fletcher vs. Peck, 5 Cranch 87, 3 L. Ed. 162 6

Ford vs. Delta & P. Land Co., 164 U. S. 662, 41 L. Ed. 590 6

Houston & T. C. R. Co. vs. Texas, 170 U. S. 243, 42 L. Ed. 1023 6

Lost Creek School Twp. vs. York, (Ind.) 21 N. E. 2d 58 7

Lynch vs. United States, 292 U. S. 571, 78 L. Ed. 1434 3

Massa vs. Nastri, 125 Conn. 144, 3 Atl. 2d 839 6

New Jersey vs. Yard, 95 U. S. 104, 24 L. Ed. 352 6
New York E. Lines Co. vs. Empire City Sub. Co., 235 U. S. 179, 59 L. Ed. 184, 35 S. Ct. 72, L. R. A. 1918E 374, Ann. Cas. 1915A, 906 6
Pac. Mail S. S. Co. vs. Joliffe, 2 Wall. 450, 17 L. Ed. 805 6
Pennoyer vs. McConnaughy, 140 U. S. 1, 35 L. Ed. 363 6
Russell vs. Sebastian, 233 U. S. 195, 58 L. Ed. 912 6
Worthen vs. Kavanaugh, 295 U. S. 56, 79 L. Ed. 1298, 97 A. L. R. 905 6

Statutes—

False Claims Statutes, R. S. 3490-3493, 31 U. S. C. 231-234 2
Public Law No. 213, 78th Congress, 1st Session, Approved Dec. 23, 1943 ..... 1, 2, 5

Miscellaneous—

12 Am. Juris., Sec. 390 5
12 Am. Juris., Sec 406 5

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 560.

LOU NATHANSON, PETITIONER,

VS.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

The Solicitor General's brief recognizes the futility of contending that the obligation of the statutory contract duly accepted by petitioner and which he actively proceeded to perform, was not impaired by the decision of the Circuit Court of Appeals. The same vice inheres (as to this case and approximately two hundred similar cases pending) in Public Law No. 213, which was enacted about the time the petition for the writ of certiorari was filed.

Not a word is offered in support of its validity, except

the feeble formal statement (p. 14) that no vested right was impaired, because petitioner's rights were inchoate until final judgment was rendered. The cases cited were reviewed and clearly distinguished in the petition for the writ (pp. 17-25). All construe a different type of statute, under which suits were filed in the name of the United States alone, except the Griswold and White cases. The latter relates to a mere statutory privilege, not of a contractual nature. That case is distinguished by the Lynch case, from which we later quote. The Griswold case distinguishes the two types of statutes, and *Marcus* v. *Hess* also recognizes the difference. None of the cases cited, except the Griswold case, apply to *qui tam* actions authorized by the False Claims Statute.

We challenge the statements (pp. 8-15) that the enactment of Public Law No. 213 renders a review of a decision herein of no consequence. That reflects a myopic cloistered vision, insulated from reality, of those charged in behalf of the Nation with the duty of searching the far horizons to guard its best interests. Those duties in the national interests were obscured by the desire for more power for the Justice Department, which actively promoted its enactment.

Because the new statute is urged as a chief reason to oppose the writ, its invalidity in purporting to repudiate and impair lawful statutory obligations contracted by the United States, with the consequent violation of the Fifth Amendment of the Constitution of the United States, emphasizes the necessity for the writ. It has been the uniform historical course for the Court to unreservedly proclaim in the public interests that the Constitution and the Court stand as vigilant guardians of the faith and honor of the United States to deny the right of all De-

partments and officers of the Government to repudiate contractual obligations binding upon the United States.

Millions of citizens, within and without the armed forces of the Nation, cheerfully and patriotically deny themselves comforts to buy bonds to support National Defense and the prosecution of the war against totalitarian powers. They are sustained by and glory in their faith in the integrity and honor of the United States, which they knew as the one nation which has never stooped to repudiation, either in times of war or peace.

It is regrettable that there has been no official visualization beyond the unfortunate scramble for complete departmental power. That immediate objective foreclosed consideration of the grist which unconsciously is supplied for use in the whirling mills of Axis propagandists. One grain of repudiation to feed into his propaganda machine has heretofore been sought in vain by Dr. Goebbels and all of his experts. Shall it now be supplied because well-meaning men have failed to look and see where their path leads?

If there is anything of more transcendent public importance than to maintain the abiding faith of the whole population of the Nation in the integrity of their Government, we cannot conceive what it may be. A single permitted draught of repudiation even to add a cubit of powers to the Justice Department, invites disintegration of a public faith now strong enough to more than merely move mountains.

The Government is in the same relatively indefensible position here as in *Lynch* v. *United States*, 292 U. S. 571, 78 L. Ed. 1434, where it sought to sustain the Economy Act of March 20, 1933, Ch. 3, 48 St. at L. It would be presumptuous and hopeless indeed for the Govern-

ment to challenge the sound morals and law exemplified in the language of the Court in the Lynch case, viz.:

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, *the due process clause prohibits the United States from annulling them,* unless, indeed, the action taken falls within the federal police power or some other paramount power.

"The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' *Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.* No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. *But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.* To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, *it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citi-*

zen.' Sinking Fund Cases, 99 U. S. 700, 719, 25 L. Ed. 496, 501" (Emphasis ours).

The decision of the Circuit Court of Appeals impairing the obligations of petitioner's statutory contract, and Public Law No. 213, equally deny the security guaranteed by the Fifth Amendment of the Constitution of the United States. Both are implicitly and inescapably condemned by the Lynch case.

12 Am. Jur., Sec. 406, is supported by decisions of this court in saying:

> "It has become the established law that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause of the Federal Constitution forbidding impairment of contract obligations; and when such a right has arisen, the repeal of the statute does not affect the right or an action for its enforcement. * * *
>
> "The general principle is established in American jurisprudence that a grant under which rights have vested amounts to a contract and that a subsequent statute attempting to impair or annul such grant is unconstitutional, because it is a law impairing the obligation of contracts."

12 Am. Jur., Sec. 390, is similarly supported where it states:

> "The repeal of a law which constitutes a contract is an impairment of its obligation. The obligation of a contract is impaired by a statute which alters its terms by imposing new conditions or dispensing with conditions, or which adds new duties, releases or lessens any part of the contract obligation, or substantially defeats its own end. A law may be within the

constitutional inhibition against impairment of contract obligations by implication, as well as by expression. It may also be stated that this constitutional provision is considered as rendering void any statute which is retrospective and which destroys a vested right of action arising *ex contractu*."

That the acceptance of a statutory offer constitutes a contract is held in *N. Y. Elec. Lines Co.* v. *Empire City Subway Co.*, 225 U. S. 179, 59 L. Ed. 184, 35 S. Ct. 72, L. R. A. 1918E, 874 Ann. Cas. 1915A, 906; *Russell* v. *Sebastian*, 233 U. S. 195, 58 L. Ed. 912; *Houston & T. C. R. Co.* v. *Texas*, 170 U. S. 243, 42 L. Ed. 1023; *New Jersey* v. *Yard*, 95 U. S. 104, 24 L. Ed. 352; *Pac. Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. Ed. 805; *Ford* v. *Delta & P. Land Co.*, 164 U. S. 662, 41 L. Ed. 590; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. Ed. 363; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. Ed. 553; *Worthen* v. *Cavanaugh*, 295 U. S. 56, 79 L. Ed. 1298, 97 A. L. R. 905; *Massa* v. *Nastri*, 125 Conn. 144, 3 Atl. 2d 839; *Duke Power Co.* v. *S. Car. Tax Comm.*, (C. C. A. 4) 81 F. 2d 513, cert. denied 298 U. S. 669, 80 L. Ed. 1319.

That a later statute may not impair or annul a statute which, when accepted, constitutes a contract because it impairs contract obligations, is held by *Douglas* v. *Kentucky, supra; Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162; *Appleby* v. *New York*, 271 U. S. 364, 70 L. Ed. 992.

Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629, rules that when a contract has once passed into an accepted *bona fide* grant, that neither the King nor a private person may recall the grant, even if the conveyance was voluntarily made, and that a grant of franchise is not distinguishable in principle from a grant of any other property.

Anderson v. *Brand*, 303 U. S. 667, 82 L. Ed. 685, 113 A. L. R. 1482, held that the Indiana Teachers Tenure Law created a constitutionally enforceable contract obligation which could not be changed by subsequent statute. See to the same effect, *Clark Co.* v. *Woodbury*, (C. C. A. 8) 187 Fed. 412; *Lost Creek School Twp.* v. *York*, (Ind.) 21 N. E. 2d 58.

Conclusion.

The dynamic force of fundamental principles and rights secured against violation by the Constitution may not be negatived by inferior courts or by the Congress so long as the Constitution and this Court endures.

The inescapable facts and the public interests make it imperative that the Court again proclaim that the dignity of the United States will not permit any repudiation of its contracted obligations.

Respectfully submitted,

Lou Nathanson,
Petitioner,

By J. Francis O'Sullivan,
Maurice J. O'Sullivan,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	8
Conclusion	15
Appendix A	16
Appendix B	20

CITATIONS

Cases:	
Barnard v. *Gostling*, 2 East. 569	15
The Confiscation Cases, 74 U. S. 454	15
Ettelson v. *Metropolitan Life Ins. Co.*, 317 U. S. 188	14
Griesa v. *Mutual Life Ins. Co.*, 165 Fed. 48	14
McLane v. *United States*, 6 Pet. 404	15
United States v. *Griswold*, 24 Fed. 461, affirmed, 30 Fed. 762	15
United States ex rel. Marcus v. *Hess*, 317 U. S. 537	13
United States v. *Morris*, 10 Wheat. 246	14
White v. *United States*, 299 Fed. 855, affirmed, 270 U. S. 175	15
Statutes:	
Criminal Code Section 37, (18 U. S. C. 88)	3
False Claims Statute (Rev. Stat. §§ 3490-3493; 12 Stat. 696, 31 U. S. C. 231-234)	2, 4, 10, 11, 16
Judicial Code § 129 (28 U. S. C. 227)	14
Public Law No. 213 (78th Cong., 1st Sess.), approved December 23, 1943	3, 7, 8, 9, 10, 20
Rev. Stat. § 5438	10
Miscellaneous:	
II Blackstone, *Commentaries* (Lewis Ed. 1900)	15

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 560

LOU NATHANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (A. R. 13) [1] is

[1] The printed record filed with the petition in this case consists of the Transcripts of the Record in the circuit court of appeals in the three cases there involved (designated in that court as Nos. 12673, 12674, and 12675) and the supplemental record in that court. Since each of these four transcripts is separately paginated, they will be referred to in this brief as follows: Transcript in No. 12673: "N. R."; Transcript in No. 12674: "G. R."; Transcript in No. 12675: "P. R."; Supplemental record on appeal: "A. R." These designations correspond with the references adopted by the petitioner.

reported in 138 F. (2d) 48. The memorandum opinions of the District Court of the United States for the Western District of Missouri, Western Division (N. R. 10; G. R. 8; and P. R. 6), are not officially reported.

JURISDICTION

The judgment of the circuit court of appeals (A. R. 23) was entered on September 29, 1943. A motion by petitioner to stay the mandate pending his application for a writ of certiorari was denied on October 25, 1943 (A. R. 24–25), and the mandate was issued October 28, 1943 (A. R. 26–27). The petition for a writ of certiorari was filed December 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly stayed the suit of a private *qui tam* plaintiff under the False Claims Statute (Rev. Stat. § § 3490–3493; 12 Stat. 696, 31 U. S. 231–234), based on alleged frauds against the United States disclosed in criminal proceedings instituted by the United States, where the purported complaint in such *qui tam* suit was filed a few hours prior to the diligent filing of a civil complaint by the United States under that statute on account of the same alleged acts of fraud.

2. Whether this case presents any question warranting review by this Court in light of the enactment, after the decision below, of Public Law No. 213 (78th Cong., 1st Sess.), approved December 23, 1943.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendices, pp. 16–23.

STATEMENT

The United States had entered into certain contracts with Baker-Lockwood Manufacturing Company, Inc., for the supply of war materials to the Government. After extensive investigation by Government officials of certain transactions connected with those contracts, the United States Grand Jury in the Western District of Missouri, upon the presentation of evidence by the Department of Justice, returned an indictment on Friday, February 12, 1943, charging that company and certain individuals with having entered into a conspiracy to defraud the United States in violation of Section 37 of the Criminal Code, 18 U. S. C. 88. (G. R. 6.)

Prior to Thursday, February 11, 1943, Assistant Attorney General Francis M. Shea had prepared a complaint, based on the same investigation, in a civil action in the United States District Court for the Western District of Missouri, against the same defendants, to recover penalties

and double damages for said alleged frauds under the False Claims Statute (Rev. Stat. §§ 3490–3493; 12 Stat. 696; 31 U. S. C. 231–234) (G. R. 6). On the same day a covering letter from Mr. Shea to the United States Attorney for the Western District of Missouri, stating that this complaint was being enclosed for filing at the same time that the aforesaid indictment was returned, was mailed from the office of the Assistant Attorney General to the said United States Attorney (G. R. 6). However, due to a clerical error in the central mailing room of the Department of Justice in Washington, the complaint was not enclosed in this letter (G. R. 7). This omission was not discovered until Saturday, February 13, 1943 (the day after the indictment was returned), when the United States Attorney received the covering letter without the complaint (G. R. 6). At that time he immediately advised the Claims Division of the Department of Justice of the fact, whereupon the complaint was promptly forwarded to him from Washington (G. R. 6). He received it in Kansas City, Missouri, on Monday morning, February 15, 1943, and within an hour of the opening of the Clerk's Office he filed it on the same day (G. R. 7).

In the meantime, however, the indictment had been returned on the evening of Friday, February 12, 1943, and was made public at that time. On the morning of Saturday, February 13, 1943, pe-

titioner Lou Nathanson traveled from Chicago to Kansas City by airplane and, on the basis of the publicity concerning the return of the indictment, filed late Saturday afternoon in the same district court what purported to be a complaint against the indicted defendants seeking penalties and double damages under Section 3490 of the Revised Statutes (G. R. 7). The complaint in the Government's suit, filed early Monday morning, thus followed Nathanson's suit by only a few filing hours. On Wednesday, February 17, 1943, one Benjamin P. Pink instituted a third suit against the same defendants in the same court and under the same statute, also based on the Government's indictment (P. R. 1–3).

The complaint filed by Nathanson on February 13, 1943, did not allege that any false claims had been made or caused to be made by the defendants against the United States (N. R. 1–3), and on March 15, 1943, Nathanson filed a so-called first amended complaint in which such false claims were alleged (N. R. 3–7).

The defendants filed separate motions to stay each of the three actions, contending that they could be compelled to respond in only one (N. R. 10; G. R. 4–5; P. R. 4–5). The United States moved to stay all three cases pending the disposition of its criminal case (N. R. 8–10). All these motions were argued before the district court at a consolidated hearing, in which the court treated

the motions as "motions to stay proceedings in two of the three cases" (N. R. 10), all parties being "agreed that the three civil actions involved the identical cause of action against the defendants and that only one of them could be tried" (A. R. 16). At the conclusion of the hearing on the motions, the district court entered an order staying the trial of the Government's civil action and of Pink's action until further order of court (N. R. 11; G. R. 9; P. R. 6).[2] The Government appealed from the orders staying its civil suit (G. R. 9)[3] The circuit court of appeals reversed the stay, holding that the False Claims Statute did not require the Government, after having carefully and diligently taken all steps "necessary to the prose-

[2] Pink's action is of no further importance, since Pink took no affirmative steps after filing his complaint.

[3] The Government's motion to stay all three civil cases pending the disposition of its criminal case was denied by the district court and the denial affirmed by the circuit court of appeals (A. R. 24), but with appropriate instructions which protected the Government's interests (A. R. 22). This order is not here involved.

On August 26, 1943, petitioner Nathanson moved to dismiss the appeal, contending (1) that the United States is not a party to his suit, and hence may not appeal from an order made in it; (2) that the Government had not in fact perfected an appeal from the order in the Nathanson suit staying the Government's civil action; and (3) that such order is merely procedural and therefore not appealable (A. R. 4–6). All these contentions were rejected by the circuit court of appeals (A. R. 17) and an order entered denying the motion to dismiss the appeal (A. R. 23). In any event, the Government properly appealed from the stay in its own suit, and the order of the court below effectively disposed of all questions before it.

cution of an action" under that statute, to "stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse" (A. R. 21). Accordingly, the circuit court remanded the cases to the district court "with directions to stay proceedings in the Nathanson suit" and in the Pink suit (A. R. 23–24). This is the order of which the petitioner seeks review.

After the decision below was rendered on September 29, 1943, Public Law No. 213, approved December 23, 1943, repealed Section 3493 of the Revised Statutes and amended Section 3491 thereof. As amended, Section 3491 provides that when any suit is brought thereunder by an informer, the Attorney General shall be notified, and the United States may within 60 days thereafter enter an appearance in such suit and carry it on "solely by the United States * * * as if it were instituting the suit." With respect to all suits pending under Section 3491 on December 23, 1943, "whether or not on appeal," the amendment directs that "the court in which such suit is pending shall stay all further proceedings" and shall notify the Attorney General, who shall then have "sixty days from the date of such notice to appear and carry on such suit in accordance with" the procedure outlined above. The amendment provides further that the court "shall have no jurisdiction to proceed with any" informer suit hereafter brought, nor any "pending suit brought

under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought" (see Appendix B, pp. 20–23).

ARGUMENT

1. With the enactment on December 23, 1943, of Public Law No. 213, the present case becomes of no general importance. For under it the United States may now take over all pending *qui tam* suits under the False Claims Statute, as well as all such suits hereafter instituted, and may carry them on "solely by the United States," proceeding "in all respects as if it were instituting the suit" (see Appendix B, pp. 21–22). Moreover, district courts no longer have jurisdiction to proceed with informers' suits "based upon evidence or information in the possession of the United States * * * at the time such suit was brought" (*ibid.*), and such suits will accordingly be subject to dismissal upon motion by the Government. Since all *qui tam* suits, including those pending, may now be taken over or abated by the United States, the problem presented in the instant case is no longer of consequence in pending cases and cannot arise in future litigation.

2. Public Law No. 213 renders the legal issue presented by the petition of no consequence to the

ultimate disposition of this case. Whether or not the stay of Nathanson's suit now in effect is permitted to continue, that suit, under the amended Section 3491, is subject to dismissal for want of jurisdiction or to adoption by the United States. At no time during the course of the litigation has petitioner denied the Government's assertion in the record (G. R. 7) that the Nathanson suit "was based upon evidence or information in the possession of the United States * * * at the time suit was brought," nor does he do so now. Consequently, under Public Law No. 213, both the district court and the court below may be without jurisdiction (Sec. 3491 (C)). If this is not so on the present record, a showing of such facts may be made in the lower courts, requiring dismissal of Nathanson's suit. In any event, the Government may, under Section 3491 (C), take over Nathanson's suit and prosecute it as its own.[4]

These procedures are equally available to the Government under the present mandate of the circuit court of appeals. The order under review

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[4] Where an informer's suit is taken over by the United States under Public Law No. 213, the court may allow fair and reasonable compensation up to 1/10 of the recovery, "for disclosure of the information or evidence not in the possession of the United States when such suit was brought." If the informer is allowed to bring his suit to final judgment or settlement, he may be allowed up to ¼. Sec. 3491 (E). See Appendix B, pp. 22–23.

here does not dismiss but merely stays Nathanson's suit, pending the disposition of the Government's suit. Accordingly, Nathanson's suit, under the present remand to the district court, is a "pending suit" under Section 3491 (C) and is, therefore, subject to abatement or dismissal. Hence, there is little point in disturbing the order below.

3. The circuit court of appeals properly stayed the informer's suit filed by Nathanson only a few hours prior to the time the Government, acting with proper care and diligence, filed its own civil action against the defendants for the same cause of action.

Section 3490 of the False Claims Statute provides that any person who commits a fraudulent act against the United States, prohibited by Rev. Stat. §5438, shall forfeit to the United States $2,000 for such act, plus double the damages sustained by it thereby, both recoverable in the same suit. Section 3492 of the False Claims Statute imposes a mandatory duty upon the Government to bring such suits in appropriate cases. That section provides that—

> It *shall be the duty* of the several district attorneys of the United States * * * *to be diligent* in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit * * * *and to cause them to be proceeded against* in due form of law for the

recovery of such forfeiture and damages. [Italics supplied.]

The clear duty imposed upon the United States by Section 3492 is to be contrasted with the permissive right granted to *qui tam* plaintiffs by Section 3491. That section provides that "any person" *"may"* bring suit in the name of the United States to recover the penalties and double damages, Section 3493 entitling him to receive, upon final judgment, one-half the recovery. To have any real meaning, the mandatory language of Section 3492, imposing upon the Government a duty of diligence in inquiry and prosecution of frauds, must be read as affording a reasonable opportunity to the Government to obey the Congressional orders. This requires a chance to make diligent inquiry into violations and to institute and prosecute to judgment civil suits against violators. Since the informers' permissive right to sue under Section 3491 is for the same cause of action, so that recovery can be had only once, it must follow that the informers' permissive right of action can be exercised only in those instances where the district attorneys do not fulfill their obligations under Section 3492.

Petitioners' contention that "the single cause of action created by the False Claims Statutes was appropriated when petitioner first filed his suit" (Pet. 15) would mean that a *qui tam* plaintiff may prevent the government from effectively

obeying the directions of Section 3492. In the words of the court below, "To hold that the Government, after the careful and diligent investigation and preparation necessary to the prosecution of an action in the Government's interest and on its behalf, must stand aside and stay its law-enforcement arm merely because a private citizen, having knowledge of the frauds involved, has won the race to the courthouse," would "subjugate the public interest in the orderly administration of justice to the private interest of a citizen in the recovery for himself of the reward offered by the statute" (A. R. 20–21). For these reasons it was properly held below that under the False Claims Statute "informer suits were only authorized when the Government itself does not proceed in the same cause of action" (A. R. 21). Petitioner does not challenge the finding of the court below that here the Government obeyed the mandate contained in Section 3492 "with diligence and dispatch" (A. R. 20).

Petitioner is entitled to prevail only if he can show that as a matter of law, under the statute, the first *qui tam* plaintiff must always be accorded priority as against the Government. Certainly nothing in the statute requires that it be given any such construction. If the courts have any discretion as to whose case should be tried first, that discretion can only be reasonably exercised in

the circumstances of this case in favor of the Government's suit.[*]

Nothing in the decision of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, is inconsistent with the interpretation accorded to the False Claims Statute by the court below. In that case there was no contest between the Government and an informer for the right to sue under the statute, because the Government had neither brought a civil action under the Statute nor evinced any intention to do so. The question was simply whether a *qui tam* plaintiff had the right to maintain such an action in those circumstances, and this Court answered this in the affirmative. That the absence of a suit by the Government was of controlling significance is clearly to be gathered from the opinion of this Court. After pointing out that "one of the chief purposes of the act, which was itself first passed in wartime, was to stimulate action to protect the Government against war frauds," the Court said (p. 547):

> To the end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private par-

[*] The district court ruled that petitioner was entitled to priority as a matter of law and did not purport to exercise discretion (N. R. 11). Any exercise of discretion in favor of petitioner would obviously have been an abuse of discretion reversible by the appellate court.

ties *should the prosecuting officers be tardy in bringing the suits.* [Italics supplied.]

Here, on the contrary, there was diligent institution and prosecution by the Government of its statutory civil remedy.

4. Petitioner's contention (Pet. 17) that the order of the district court staying the prosecution of the Government's civil action was not appealable was properly rejected below. The order, by permitting the trial of one of three separate suits dealing with the same cause of action and staying the others, "effectively disposed of the suits which were stayed" (A. R. 18). It was thus clearly injunctive in nature and hence appealable. Judicial Code, § 129, 28 U. S. C. 227; *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188; *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48 (C. C. A. 8).[6]

To deny effect to Nathanson's suit does not deprive him of any vested rights. For it is well settled that the commencement of a *qui tam* action merely gives the plaintiff an inchoate interest which does not become vested until judgment is recovered. *United States* v. *Morris*, 10 Wheat.

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[6] Likewise without merit is petitioner's contention "that the Government * * * was not a party to petitioner's case and had no right to file the motion to stay that action" (Pet. 15). As the court below observed, "the United States is not only a party on the record in the Nathanson suit, it is a real party in interest, and, as such, * * * has the right to appear and be heard in the protection of its interests (A. R. 17).

246; *McLane* v. *United States,* 6 Pet. 404; *United States* v. *Griswold,* 24 Fed. 361 (D. Ore.), affirmed, 30 Fed. 762 (C. C. A. 9); cf. *The Confiscation Cases,* 74 U. S. 454. The right of a *qui tam* plaintiff to maintain such an action, based upon no wrong or damage to himself, exists only by virtue of statute (*Barnard* v. *Gostling,* 2 East. 569; II Blackstone, *Commentaries* (Lewis Ed. 1900), p. 436), and there is no "vested interest in statutory privileges." *White* v. *United States,* 299 Fed. 855, 859 (D. Va.), affirmed, 270 U. S. 175.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

In view of Public Law No. 213, it is respectfully suggested that such a denial be expressly stated to be without prejudice to the rights of the parties to take any appropriate action in the district court under that statute.

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Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

JEROME H. SIMONDS,
Attorney.

JANUARY 1944.

APPENDIX A

Sections 3490–3493 of the Revised Statutes before the amendment of December 23, 1943 (12 Stat. 696, 31 U. S. C., Sections 231–234) read as follows:

> SEC. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.
>
> SEC. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be with-

drawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case and shall have no claim therefor on the United States.

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

> SEC. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers, or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other

property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

APPENDIX B

Public Law No. 213 (78th Cong., 1st Sess.), approved December 23, 1943, amends Section 3491 of the Revised Statutes (31 U. S. C., Sec. 232) to read as follows:

SEC. 3491. (A) The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney

General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before

such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved

therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States.

SEC. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 560. NATHANSON *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. January 31, 1944. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court of the United States for the Western District of Missouri with directions to proceed in conformity with the Act of December 23, 1943, c. 377, 57 Stat. 608. *Messrs. J. Francis O'Sullivan* and *Maurice J. O'Sullivan* for petitioner. *Solicitor General Fahy* and *Assistant Attorney General Shea* for the United States. See *post*, p. 746.